

EXHIBIT F-1

In The Matter Of:
Yazdani vs.
BMW

William Vigilante, Jr., Ph.D.
March 15, 2016

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Thomas G. Oakes Associates
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Yazdani vs. BMW

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March 15, 2016

Page 1			
1 IN THE UNITED STATES DISTRICT COURT			2
2 FOR THE EASTERN DISTRICT OF PENNSYLVANIA			
3 PARVEZ and RAZIA			4
4 YAZDANI Plaintiffs,			5
5 -vs-			6
6 BMW OF NORTH AMERICA,			7
7 LLC and			8
8 BMW MOTORRAD USA, a			9
9 DIVISION OF BMW OF			
NORTH AMERICA, LLC			
Defendants : NO. 2:15-cv-01427-PD			
10 Tuesday, March 15, 2016			11
11 Oral deposition of WILLIAM J.			12
12 VIGILANTE, JR., PhD, CPE was taken at the Law			13
13 Offices of deLuca Levine, Three Valley Square,			14
14 Suite 220, Blue Bell, Pennsylvania, commencing			15
15 at 10:00 a.m., before Debra J. Veneziale,			16
16 Court Reporter and Notary Public; in and for			17
17 the Commonwealth of Pennsylvania.			18
18 * * *			19
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<p>1 THE COURT REPORTER: Usual 2 stipulations?</p> <p>3 MR. HEINOLD: Yes.</p> <p>4 MR. LEVINE: Yes.</p> <p>5 ---</p> <p>6 (It is hereby stipulated 7 and agreed by and between counsel for 8 the respective parties that sealing, 9 certification, and filing are waived 10 and that all objections, except as to 11 the form of questions, be reserved 12 until the time of trial.)</p> <p>13 ---</p> <p>14 WILLIAM J. VIGILANTE, JR., 15 PhD., CPE, after having been first duly 16 sworn, was examined and testified as 17 follows:</p> <p>18 ---</p> <p>19 EXAMINATION</p> <p>20 ---</p> <p>21 BY MR. HEINOLD:</p> <p>22 Q. I know you've been deposed. 23 You don't need instructions from me about a 24 deposition, do you?</p>	Page 5	Page 7
<p>1 A. I don't think so.</p> <p>2 Q. Okay. Tell me about your 3 business organization. What's the official 4 name?</p> <p>5 A. I'm doing business as Vigilante 6 Forensic. The LLC is Vigilante Consulting.</p> <p>7 Q. Okay. How big is your 8 organization?</p> <p>9 A. You're looking at it.</p> <p>10 Q. No staff.</p> <p>11 MR. LEVINE: I'm not on his 12 staff.</p> <p>13 MR. HEINOLD: I'm not looking 14 at you.</p> <p>15 THE WITNESS: No staff.</p> <p>16 BY MR. HEINOLD:</p> <p>17 Q. You do everything yourself?</p> <p>18 A. Yes.</p> <p>19 Q. Do you outsource any of it?</p> <p>20 A. No.</p> <p>21 Q. So everything that you've done 22 here for this case is all you?</p> <p>23 A. All the work that I've done, 24 yes.</p>	Page 6	Page 8

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<p style="text-align: right;">Page 9</p> <p>1 Q. Human factors?</p> <p>2 A. Yes.</p> <p>3 Q. What do you describe as human</p> <p>4 factors?</p> <p>5 A. Basically human factors are</p> <p>6 ergonomics, which is a synonym, is a science</p> <p>7 that studies how people interact with their</p> <p>8 use of all different types of products,</p> <p>9 machines, systems and environments.</p> <p>10 And what we're interested from</p> <p>11 the human factors side is the person that's</p> <p>12 using the products. We're interested in their</p> <p>13 perceptual abilities, that is their ability to</p> <p>14 see, hear and capture information from the</p> <p>15 environment, how they process that information</p> <p>16 and make decisions. How things such as</p> <p>17 expectancies and prior experiences affect how</p> <p>18 we perceive things and how we make decisions.</p> <p>19 We are also interested in</p> <p>20 people's physical abilities and limitations.</p> <p>21 For example, strengths and weaknesses, ability</p> <p>22 to lift, range of motion, sizings of people,</p> <p>23 human gait or ability to walk, run, so forth.</p> <p>24 And then we as a field in a</p>	<p style="text-align: right;">Page 11</p> <p>1 Plaintiffs, I'm talking about in the</p> <p>2 litigation setting where you are criticizing</p> <p>3 the warning.</p> <p>4 A. Yes, overall my case work tends</p> <p>5 to trend about 60, 65 Plaintiff, Defendant.</p> <p>6 Q. 60 to 65 Plaintiff?</p> <p>7 A. Yes.</p> <p>8 Q. And the rest is Defendant?</p> <p>9 A. 35, 40 Defendant.</p> <p>10 Q. All right. How many of your</p> <p>11 Plaintiff clients are insurance companies?</p> <p>12 A. Subrogation work is maybe 30</p> <p>13 percent of my work.</p> <p>14 Q. Of your total?</p> <p>15 A. Yes. Maybe that's little high.</p> <p>16 Q. How about for Allstate?</p> <p>17 A. Allstate, like total percentage</p> <p>18 of work?</p> <p>19 Q. Allstate Insurance, how much</p> <p>20 work do you do for them?</p> <p>21 A. I don't have a number to give</p> <p>22 you.</p> <p>23 Q. Can you give me an</p> <p>24 approximation?</p>
<p style="text-align: right;">Page 10</p> <p>1 professional's work with engineers, designers</p> <p>2 and architects design products, machines and</p> <p>3 systems that are easy to use, that are</p> <p>4 efficient to use and most importantly are safe</p> <p>5 to use.</p> <p>6 Q. Do you work in any capacity</p> <p>7 other than forensics? Do you know what I mean</p> <p>8 by that?</p> <p>9 A. Sure. I do traditional</p> <p>10 consulting work at times.</p> <p>11 Q. What percentage of your work is</p> <p>12 what you refer to as traditional consulting</p> <p>13 work?</p> <p>14 A. Traditionally it's been a small</p> <p>15 percentage, anywhere from five to 10 percent.</p> <p>16 At some points of the year it's zero percent.</p> <p>17 Q. When you say percentage, are</p> <p>18 you talking about percentage of the income you</p> <p>19 create from it, or are you talking about the</p> <p>20 percentage of projects?</p> <p>21 A. I think they're probably</p> <p>22 positively correlated, so both.</p> <p>23 Q. What percentage of your work do</p> <p>24 you do for Plaintiffs? And when I say</p>	<p style="text-align: right;">Page 12</p> <p>1 A. I don't think I can give you</p> <p>2 that. It would be a wild guess. I don't</p> <p>3 track information based upon insurance</p> <p>4 carrier.</p> <p>5 Q. Okay. Well, how many cases do</p> <p>6 you have open right now?</p> <p>7 A. Open cases, I'm going to say</p> <p>8 around 50.</p> <p>9 Q. And how many of them are</p> <p>10 currently open that you're retained on behalf</p> <p>11 of Allstate?</p> <p>12 A. I don't know. I would say that</p> <p>13 there's at least one other, but I don't know</p> <p>14 how many more if there is more than that.</p> <p>15 Q. How about this office, deLuca</p> <p>16 Levine, how much work do you do for this</p> <p>17 office?</p> <p>18 A. I've done work for them in the</p> <p>19 past, and I'm currently working on other cases</p> <p>20 for them.</p> <p>21 Q. And what percentage of your</p> <p>22 business would you say is from this office or</p> <p>23 iterations of this office?</p> <p>24 A. Yes, maybe less than five</p>

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<p style="text-align: right;">Page 13</p> <p>1 percent.</p> <p>2 Q. How many do you have currently</p> <p>3 open?</p> <p>4 A. I have maybe five, six cases</p> <p>5 open.</p> <p>6 Q. Are any of those on-product</p> <p>7 warning cases?</p> <p>8 A. Yes.</p> <p>9 Q. How many?</p> <p>10 A. All of them.</p> <p>11 Q. On product?</p> <p>12 A. Yes.</p> <p>13 Q. In each of those cases are you</p> <p>14 advocating for an on-product warning?</p> <p>15 A. In each of those cases I'm</p> <p>16 advocating to my opinion.</p> <p>17 Q. Is your opinion that there</p> <p>18 should be an on-product warning?</p> <p>19 A. It depends on the case.</p> <p>20 Q. So the answer to my question</p> <p>21 would be no, not each of the cases you're</p> <p>22 advocating for an on-product warning?</p> <p>23 A. It depends on the case. I</p> <p>24 don't recall the cases at the moment. So some</p>	<p style="text-align: right;">Page 15</p> <p>1 of those cases, or are you involved in a case</p> <p>2 where you haven't yet issued a report?</p> <p>3 A. I think most of them I have</p> <p>4 issued a report. There may be one or two that</p> <p>5 I haven't.</p> <p>6 Q. Any of them involve</p> <p>7 motorcycles?</p> <p>8 A. No.</p> <p>9 Q. Have you ever had a motorcycle</p> <p>10 case before?</p> <p>11 A. In what way? I've been</p> <p>12 involved in motorcycle cases in the past where</p> <p>13 they've been involved in collisions, whether</p> <p>14 they be multi vehicle or single vehicle,</p> <p>15 whether they be a dirt bike type vehicle or a</p> <p>16 road vehicle. So I've been involved in</p> <p>17 motorcycle cases in the past.</p> <p>18 Q. Well, how about motorcycle</p> <p>19 cases where the issue is warning?</p> <p>20 A. I don't recall any offhand.</p> <p>21 Q. Do you own a motorcycle?</p> <p>22 A. Yes.</p> <p>23 Q. What do you own?</p> <p>24 A. I own a Harley-Davidson Softail</p>
<p style="text-align: right;">Page 14</p> <p>1 of them may be on-product. Some of them may</p> <p>2 not be. It may not be relevant.</p> <p>3 Q. All right. I'm lost, so let me</p> <p>4 start over.</p> <p>5 A. Sure.</p> <p>6 Q. You said you have five or six</p> <p>7 cases currently with this office?</p> <p>8 A. Yes, five or six additional</p> <p>9 cases.</p> <p>10 Q. Additional cases. And I asked</p> <p>11 how many of those involve the issue of</p> <p>12 on-product warning and I thought you said all</p> <p>13 of them?</p> <p>14 A. Yes, maybe I misunderstood the</p> <p>15 question. They're all warnings cases.</p> <p>16 Q. Yes.</p> <p>17 A. I don't recall if all of them,</p> <p>18 in my opinions, I've come to the opinion that</p> <p>19 they needed an on-product warning. Some of</p> <p>20 them may have been that the on-product warning</p> <p>21 provided was not effective, and some of them</p> <p>22 may not have involved an on-product warning at</p> <p>23 all.</p> <p>24 Q. Have you issued reports in each</p>	<p style="text-align: right;">Page 16</p> <p>1 Deluxe 2007.</p> <p>2 Q. Is that air-cooled?</p> <p>3 A. It is air-cooled.</p> <p>4 Q. Does it have any warning</p> <p>5 stickers affixed to it?</p> <p>6 A. I don't think that there's any</p> <p>7 warning stickers on the exterior of the</p> <p>8 surfaces. There may be some under the seat,</p> <p>9 but I don't recall offhand.</p> <p>10 Q. Okay. If you don't recall, then</p> <p>11 this is probably an unfair question, but what</p> <p>12 would the stickers under the seat say?</p> <p>13 A. My guess, if I have to guess,</p> <p>14 is that they deal with the electrical system.</p> <p>15 Q. Okay. You're not aware of any</p> <p>16 other stickers?</p> <p>17 A. Nope.</p> <p>18 Q. Is this an air-cooled engine?</p> <p>19 A. Yes.</p> <p>20 Q. Do you idle it at a standstill?</p> <p>21 A. Yes, I do.</p> <p>22 Q. Okay. For how long?</p> <p>23 A. I've been known to idle it for</p> <p>24 up to 30 minutes sitting in my garage warming</p>

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<p style="text-align: right;">Page 17</p> <p>1 up, the same thing Mr. Yazdani was doing on 2 the day of the incident. 3 Q. How often? 4 A. Every winter, because I do the 5 same thing that Mr. Yazdani did. I would 6 start the bike every couple weeks and I would 7 let it run at least 10 minutes, sometimes 20, 8 sometimes up to 30. 9 Q. Would you do that if there was 10 an item in the manual that said don't do that 11 because it might catch a fire? 12 A. It doesn't say that in my 13 manual. In fact, it tells me -- 14 Q. I said if it did. 15 A. I'm sorry, in my manual it 16 tells me that you're supposed to let it idle 17 and warm up. If there was a warning in the 18 manual, I would have to see it and figure out 19 why it's there, determine what the 20 consequences are. 21 Q. The warning in your Softail 22 manual says what about warming it up? 23 A. There is no warning against 24 warming it up. It's an instruction that says</p>	<p style="text-align: right;">Page 19</p> <p>1 of them idle for multiple minutes in the 2 winter because I don't winterize the bike 3 because I like to ride them through the winter 4 months when it gets a little bit warmer. 5 So I will start them every 6 couple weeks, this has been my practice for a 7 number of years, and let them idle. How long 8 I let them idle, I let them at least idle 10 9 minutes and sometimes I let them go longer, 10 depending upon what I'm doing. 11 Q. You let them go longer by 12 choice or you let them go longer because you 13 were distracted and didn't get back to it 14 after 10 minutes? 15 A. Well, I don't think it's 16 necessarily that I was distracted and didn't 17 get back to it. It's that I didn't have a 18 concern to let it go a little bit longer if I 19 was involved in something else. 20 Q. Was it your intent to leave it 21 run for 30 minutes, or did you become involved 22 in something else and not think about it? 23 A. Yes, I became involved in 24 something else and didn't think about it. But</p>
<p style="text-align: right;">Page 18</p> <p>1 to leave the bike idle and warm up. 2 Q. Does it say how long? 3 A. It says: Starting the Engine, 4 Caution: The engine should be allowed to run 5 slowly for 15 to 30 seconds. This will allow 6 the engine to warm up and let oil reach all 7 surfaces needing lubrication. Failure to 8 comply can result in engine damage. 9 Q. That is 15 to 30 seconds? 10 A. Yes. 11 Q. When you idled your 12 Harley-Davidson -- do you still own it? 13 A. Yes. 14 Q. When you do that, how did you 15 determine what was the safe period of time to 16 do it? 17 A. First of all, I didn't know 18 that there was an unsafe limit on how long to 19 leave it idle at a standstill. I'm not sure 20 that there is an unsafe time period to leave 21 it idle at a standstill. So obviously that 22 doesn't apply to my bike. 23 And this is the third 24 Harley-Davidson I've owned, and I've let all</p>	<p style="text-align: right;">Page 20</p> <p>1 it wasn't my intent not to let it run for 30 2 minutes. 3 Q. What were the other two 4 Harley-Davidson motorcycles that you owned? 5 A. I owned a 2006 Softail Deuce 6 and a maybe 2004 Sportster 880. 7 Q. Do you only own the one now? 8 A. Yes. 9 Q. You only one at a time? 10 A. Yes, that's all my wife will 11 allow. 12 Q. Understood. 2004, what was it? 13 A. Sportster. 14 Q. And you said you did the same 15 in terms of starting them up? 16 A. Yes. 17 Q. All right. When you obtained 18 each of these motorcycles, were they new? 19 A. They were all used. 20 Q. Did you get a manual with them? 21 A. I don't think I got a manual 22 with any of them. 23 Q. Did you secure a manual? 24 A. I did for the '07 Deluxe. I</p>

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<p style="text-align: right;">Page 21</p> <p>1 don't recall if I did for '06 Deuce. 2 Q. What about the '04 Sportster? 3 A. I don't recall. 4 Q. Why did you get a manual for 5 the '07 Deluxe? 6 A. Well, typically I do my own 7 work, so I purchased the manual and the 8 service guide so if I have to add something, 9 take something off, do some work I have the 10 material I need to understand how to do so. 11 Q. When you say you do your own 12 work, are you talking about doing your own 13 maintenance? 14 A. Sure. Then I do my own 15 customization. 16 Q. What kind of customization work 17 do you do? 18 A. Well, for example, on the 19 Deluxe I replaced the handlebars, the risers 20 and the controllers up front, replaced the 21 cables, clutch cable, brake cable, upgraded 22 them to stainless. So different things like 23 that. 24 Q. How long have you been riding</p>	<p style="text-align: right;">Page 23</p> <p>1 A. Maybe when I was 12, 13. 2 Q. And had it for how long? 3 A. I had it until about 17, 18. 4 Q. And then you had nothing until 5 you bought the Sportster? 6 A. That's right. 7 Q. How old are you now? 8 A. Forty four. 9 Q. Do you consider yourself an 10 expert in motorcycles? 11 A. I consider myself maybe an 12 advanced motorcyclist. I'm not sure that 13 expert would be the correct term. 14 Q. So the answer to my question is 15 no? 16 A. The answer to your question is 17 what I gave you. 18 Q. Can you answer that question 19 yes or no, are you an expert -- do you 20 consider yourself an expert in motorcycles? 21 A. I would consider myself an 22 advanced rider. 23 Q. Okay. Well, we're in a court 24 of law and people are going to be declared</p>
<p style="text-align: right;">Page 22</p> <p>1 and working on motorcycles? 2 A. I started riding when I was 3 preteen, dirt bikes at the time, and then 4 there was a lapse before I bought my first 5 Harley, when I could afford to buy my first 6 Harley. 7 Q. How long have you owned bikes? 8 A. Well, I owned them since I was 9 preteen. 10 Q. How long have you owned 11 Harleys? When did you buy the 2004? 12 A. Where or when? 13 Q. When, what year? 14 A. I'm going to say maybe 2007, 15 2008. 16 Q. Did you own bikes before that? 17 A. I did own bikes before that. 18 Q. What did you own? 19 A. I owned dirt bikes. 20 Q. What type? 21 A. I had a Yamaha. That's it. 22 Q. Just one? 23 A. Yes. 24 Q. And when did you buy that?</p>	<p style="text-align: right;">Page 24</p> <p>1 experts or not. Are you an expert in 2 motorcycles for purposes of your opinion here 3 today? 4 A. It depends on the question as 5 to whether or not I'm an expert in that area 6 as it relates to motorcycling. So if we're 7 talking about rider behavior, I would consider 8 myself, with the experience, knowledge, 9 education and training, to be an expert in 10 that area. 11 If you're talking about whether 12 or not I can whip a bike around the racetrack 13 at 150 miles an hour, I would consider myself 14 not an expert. 15 Q. How about in design? 16 A. It depends on the issue. 17 Q. Outside of the warning issue? 18 A. It depends on the issue. 19 Q. What issues do you consider 20 yourself an expert in design of the 21 motorcycle? 22 A. If there's issues related to 23 controls and displays, I consider myself an 24 expert in the design for a motorcycle or any</p>

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<p>1 other product.</p> <p>2 Q. All right. How about other</p> <p>3 than controls and displays?</p> <p>4 A. It depends on the issue.</p> <p>5 Q. What issues do you consider</p> <p>6 yourself an expert in motorcycles other than</p> <p>7 design and displays generally?</p> <p>8 A. Controls, displays,</p> <p>9 instructional information, warnings. It could</p> <p>10 involve training. It depends on the question.</p> <p>11 Q. How about an expert in</p> <p>12 mechanical operations of a motorcycle, any</p> <p>13 design and the way it operates?</p> <p>14 A. I won't be offering any</p> <p>15 opinions with regard to the mechanical design</p> <p>16 of the motorcycle unless I'm asked.</p> <p>17 Q. Are you an expert in the issues</p> <p>18 of mechanical design of motorcycles?</p> <p>19 A. Again, it depends on the</p> <p>20 question. If I'm asked the question, I'll be</p> <p>21 happy to answer. My opinions, as I plan on</p> <p>22 giving them, are set forth in my report which</p> <p>23 deal with failure to provide adequate warning.</p> <p>24 Q. Are you an expert on how the</p>	<p>Page 25</p> <p>1 myself an expert in the design. I never</p> <p>2 designed an air-cooled engine or the oil</p> <p>3 system for an air-cooled engine. But there</p> <p>4 are aspects of it that I may be or have expert</p> <p>5 insight into, including potentially the</p> <p>6 problems with the location of the oil sight</p> <p>7 glass being on the left side of the crane case</p> <p>8 as opposed to the right side and the potential</p> <p>9 problems it creates based upon BMW's</p> <p>10 substandard design.</p> <p>11 Q. What is your expertise in</p> <p>12 motorcycle design that you feel permits you to</p> <p>13 offer that type of opinion?</p> <p>14 A. Well, first of all, I don't</p> <p>15 plan on offering it unless I'm asked. But I'm</p> <p>16 not going to cut myself off from being able to</p> <p>17 answer it if you do, in fact, ask it.</p> <p>18 So, again, my opinions as I</p> <p>19 plan to give them are laid out in my report.</p> <p>20 If you want to go into these other areas, I</p> <p>21 want to reserve my ability to answer them. So</p> <p>22 it depends upon the question.</p> <p>23 MR. LEVINE: May I interject</p> <p>24 for just a moment. As you noticed, I haven't</p>
<p>1 oil system of an air-cooled motorcycle should</p> <p>2 be designed?</p> <p>3 A. I never designed the --</p> <p>4 Q. You can answer that yes or no.</p> <p>5 Can you not answer that question yes or no?</p> <p>6 A. Well, first of all, I can</p> <p>7 answer it if you allow me to finish and not</p> <p>8 interrupt me. Second, I'll answer the way I</p> <p>9 feel best. If that works for you we can</p> <p>10 continue. Otherwise, we can stop now and come</p> <p>11 back at a later time.</p> <p>12 Q. No, we're not going to stop.</p> <p>13 I'm going to ask the question, you're going to</p> <p>14 answer the question. If I don't feel you</p> <p>15 answered my question, I'll ask you again. And</p> <p>16 if I don't feel you answered it again, I'll</p> <p>17 ask it again. If we get to the point where</p> <p>18 you don't answer my questions, perhaps then</p> <p>19 we'll stop and we'll come back at a later</p> <p>20 time.</p> <p>21 So, do you consider yourself an</p> <p>22 expert in the design of the oil system in an</p> <p>23 air-cooled motorcycle?</p> <p>24 A. Yeah, I would not consider</p>	<p>Page 26</p> <p>1 been very obstructive. It is my understanding</p> <p>2 that Mr. Vigilante's testimony, the scope of</p> <p>3 will be within the four corners of his report,</p> <p>4 although, they may be expanded by some</p> <p>5 responses to your experts' report. While I do</p> <p>6 appreciate you're trying to understand the</p> <p>7 full scopes of his expertise, we are only</p> <p>8 offering him as an expert within the four</p> <p>9 corners of his report.</p> <p>10 BY MR. HEINOLD:</p> <p>11 Q. Have you ever written any</p> <p>12 articles on motorcycle warnings?</p> <p>13 A. Not specifically to motorcycle</p> <p>14 warnings.</p> <p>15 Q. Have you done any research on</p> <p>16 motorcycle warnings?</p> <p>17 A. Not specific for motorcycle</p> <p>18 warnings, but I have done a whole lot of</p> <p>19 research on the factors that affect the</p> <p>20 adequacy of product warnings, and I've done</p> <p>21 research on the perceptions of motorcycle</p> <p>22 riders for different issues and topics.</p> <p>23 Q. Operational issues?</p> <p>24 A. Yes.</p>

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<p>Page 29</p> <p>1 Q. Any presentations on motorcycle 2 warnings? 3 A. Not specifically on motorcycle 4 warnings. 5 Q. Okay. Any articles or research 6 or presentations on on-product motorcycle 7 warnings? 8 A. Not related specifically to 9 on-product warnings, but generally related to 10 motorcycle on-product warnings, yes. 11 Q. Generally, how? 12 A. Because they deal with product 13 warnings for all, not specifically a 14 motorcycle or specifically another widget, but 15 that apply to all products. 16 Q. Have you written any articles 17 on on-product labels? 18 A. Yes. 19 Q. What have you written on 20 on-product warnings? Is it in your C.V.? 21 A. Yes. 22 Q. Can you identify which ones are 23 related to on-product warnings? 24 A. Sure. Do you have a version</p>	<p>Page 31</p> <p>1 A. Generally, my conclusion is 2 that consumers have a different expectation or 3 understanding of that phrase as opposed to the 4 intention of the manufacturer. 5 Q. Meaning what? 6 A. Meaning that they believe the 7 phrase means something different than what the 8 manufacturer intended. 9 Q. What do you believe they mean? 10 A. Well, the manufacturer often 11 means it or intends it to mean don't leave the 12 product out of your site, whereas the consumer 13 believes that as long as the product is in 14 what they believe to be a safe state, they can 15 go about their daily lives coming back to 16 check on it on a periodic basis. 17 Particularly, not aware that 18 there's a potential fire hazard or other 19 hazard associated with the product that it can 20 occur at any moment without forewarning or 21 advanced forewarning. 22 Q. You mean like don't leave this 23 because it might catch on fire? 24 A. Sure.</p>
<p>Page 30</p> <p>1 date on there just so we're talking -- 2 Q. I have the version date that 3 you gave me, November 1, 2015. 4 A. Okay. 5 Q. Is there an updated version? 6 A. There looks like that's the 7 most updated version. So, Page 5, the first 8 one is a Joyce, Byrd, Vigilante, Wogalter 9 article dealing with labeling and format 10 preferences for on-product warnings and 11 labels. 12 Q. Page 5, the one that says 13 Over-the-counter drug labeling? 14 A. Correct. The second one, 15 Consumers' interpretation of the statement: 16 "Do not leave (insert product here) 17 unattended." That is both on product and in 18 manual. 19 Q. What was your conclusion in 20 that article? 21 A. I'm sorry? 22 A. The Consumers' interpretation 23 of the statement, "Do not leave blank 24 unattended", what was your conclusion?</p>	<p>Page 32</p> <p>1 Q. And that would send a different 2 message than just don't leave this unattended? 3 A. Well, I think you're maybe 4 minimizing the issue. It's better off to read 5 the paper. I don't remember everything that's 6 in the paper. I've given you the general -- 7 Q. Do you still have these papers? 8 A. I'm sure I do. 9 Q. If I requested them, you would 10 be able to find them and produce them? 11 A. I might. You can also obtain 12 them. These are all publicly available. 13 Do you want me to continue? 14 Q. Sure. 15 A. The next one is the top of Page 16 6, Nemire and Vigilante. Page 7, the first 17 one related to on-product is Vigilante 18 Wogalter 1999. 19 MR. LEVINE: Can you just spell 20 Wogalter for her? 21 THE WITNESS: W-O-G-A-L-T-E-R. 22 The second one also deals with on-product 23 labeling, Vigilante, Wogalter 1998. 24 BY MR. HEINOLD:</p>

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<p>1 Q. Did you study under him? 2 A. Mike Wogalter is my major 3 advisor. Wogalter, Conzola and Vigilante, 4 2006 is applicable to the design of the text 5 in on-product warnings. There's a similar 6 publication under that, Wogalter, Vigilante, 7 1999.</p> <p>8 Next page, Wogalter, Vigilante, 9 2006 is a book chapter related to the 10 attention switch and maintenance of warnings 11 both on product and in manual. Wogalter, 12 Vigilante 2010 deals with formatting of on 13 product labels.</p> <p>14 Q. Some of these were written when 15 you were a student at NC State? 16 A. Some of them were done while I 17 was a graduate student at North Carolina State 18 University.</p> <p>19 Q. I also saw in your C.V. that 20 you listed the Motorcycle Safety Foundation. 21 What is that?</p> <p>22 A. The Motorcycle Safety 23 Foundation is a nonprofit organization in this 24 country that looks to improve the safety of</p>	<p>1 A. Sure. 2 Q. Are they operational classes? 3 A. Well, again, they deal with 4 basic rider course. It deals with everything 5 from personal protective equipment to pretrip 6 inspections, the correct purchasing of the 7 equipment to issues related while you're 8 riding or traveling. 9 Q. How many classes have you 10 taken? 11 A. I've taken two. 12 Q. And when did you take those? 13 A. The basic rider course was 14 probably 2005. The off-highway motorcycle 15 course maybe 2006, 2007. Or I'm sorry, the 16 basic rider course was 2006, 2007. The 17 off-highway motorcycle course was maybe a year 18 or two before that. 19 Q. Anything about warnings in that 20 organization? 21 A. How do you mean? 22 Q. Well, anything taught about 23 warnings? 24 A. Well, I'm sure they give plenty</p>

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<p style="text-align: right;">Page 37</p> <p>1 classes, did they address the issue of 2 warnings, motorcycle warning, manual or on 3 product?</p> <p>4 A. Are you asking me whether they 5 addressed the design and development of 6 warnings for motorcycles in the class, or are 7 you asking whether or not they provided 8 warnings related to the operation or ownership 9 of motorcycles in those classes?</p> <p>10 Q. Did they teach you about 11 warnings?</p> <p>12 A. Yes, I'm going to say yes.</p> <p>13 Q. What did they teach you?</p> <p>14 A. That you should look for 15 warnings and follow the warnings that they 16 provide during the classes and during the 17 training.</p> <p>18 Q. Were they classes -- they did 19 provide warnings during classes and training?</p> <p>20 A. Sure.</p> <p>21 Q. Were they operational in terms 22 of riding warnings?</p> <p>23 A. Sure. They would give you 24 warnings. For example, you should wear a</p>	<p style="text-align: right;">Page 39</p> <p>1 Incorporated, et al. 2 Q. This is 2013?</p> <p>3 A. Yes. And then 7/2014, Ramon 4 Ernesto Ortega vs. Hector Enrique Lopez, 5 Osceola Farms. That's a motor scooter, not a 6 motorcycle.</p> <p>7 Q. Which one was that? I'm 8 sorry.</p> <p>9 A. July 2014.</p> <p>10 Q. Vandenberg vs. Brunswick?</p> <p>11 A. I'm sorry, that's actually a 12 typo. That should be 2015.</p> <p>13 Q. All right. So July 2014 as it 14 appears at Page 4 at the top, Vandenberg vs. 15 Brunswick?</p> <p>16 A. On my Page 5 it's July 2014, 17 out of order. It goes from June --</p> <p>18 Q. Oh, I see, okay.</p> <p>19 A. Sorry about that.</p> <p>20 Q. No. I was looking at the top 21 of Page 4, July of 2014, Vandenberg vs. 22 Brunswick.</p> <p>23 A. No, that's not it.</p> <p>24 Q. In that case, who -- in</p>
<p style="text-align: right;">Page 38</p> <p>1 helmet. You should wear eye protection. You 2 should practice the search, evaluate, execute 3 strategy when riding to potentially avoid 4 collisions. So I'm sure that there was 5 multiple warnings that they gave through the 6 classes and trainings.</p> <p>7 Q. Any warnings that you would 8 consider relevant to your opinions in this 9 case?</p> <p>10 A. No.</p> <p>11 Q. I have your Testimony List. Is 12 that up to date?</p> <p>13 A. Do you have a date on it?</p> <p>14 Q. 1/16.</p> <p>15 A. It's been updated since then.</p> <p>16 Q. Okay. Have any of these -- any 17 of the cases on the Testimony List involved 18 motorcycles?</p> <p>19 A. If you give me a moment, I'll 20 be happy to check.</p> <p>21 A. Okay. Two of them.</p> <p>22 Q. Okay. Which ones?</p> <p>23 A. August 2013, David Vititoe vs. 24 Rocky Mountain Pavement Maintenance,</p>	<p style="text-align: right;">Page 40</p> <p>1 Vandenberg vs. Brunswick, who retained you?</p> <p>2 A. I was retained on behalf of the 3 Plaintiff.</p> <p>4 Q. What was the issue in that 5 case?</p> <p>6 A. That had to do with fall 7 protection on the upper deck of a pleasure 8 yacht.</p> <p>9 Q. Is that case still pending?</p> <p>10 A. That --</p> <p>11 MR. LEVINE: Experts are often 12 the last to know.</p> <p>13 MR. HEINOLD: Only if their 14 bill has not been paid.</p> <p>15 THE WITNESS: That one went to 16 trial in June of last year.</p> <p>17 BY MR. HEINOLD:</p> <p>18 Q. What was the result?</p> <p>19 A. I don't recall. And I don't 20 know if the bill was paid.</p> <p>21 Q. So Ortega vs. Lopez and Osceola 22 Farms, is that July 2015 or '16?</p> <p>23 A. 2015.</p> <p>24 Q. Okay. And that was also a</p>

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<p style="text-align: right;">Page 41</p> <p>1 motorcycle case? 2 A. That was a motor scooter. 3 Q. Okay. What was the issue in 4 that case? 5 A. That was a truck versus motor 6 scooter collision at a T-intersection, and it 7 had to do with the ability of the operators to 8 see and avoid each other. 9 Q. How about the Vivitoe case? 10 A. Vivitoe was a Harley-Davidson 11 Softail Deluxe that ran into the back of a 12 trailer that was attached to a truck that was 13 stopped on a four-lane roadway at a green 14 traffic light at night. 15 Q. Who retained you in this case? 16 A. I was retained on behalf of Mr. 17 Vivitoe. 18 Q. Did that go to trial? 19 A. Yes. 20 Q. What was the result? 21 A. They found for David Vivitoe, 22 although the damages were less than Plaintiff 23 I think was hoping for. 24 Q. Which sometimes occurs.</p>	<p style="text-align: right;">Page 43</p> <p>1 and his turn signal. I just don't recall if 2 that was an issue. 3 Q. Okay. Any of these involve the 4 assessment of the manufacturer's warnings, 5 whether in manuals or on product? 6 A. No. 7 Q. And I'm not limiting that 8 question to motorcycles. 9 A. I don't understand. 10 Q. The first questions I asked 11 about motorcycles. 12 A. You're talking about these two 13 specific cases? 14 Q. No. I'm talking about your 15 list. On your list, any of these cases -- 16 your testimony in any of these cases concern 17 manufacturer's -- the quality of 18 effectiveness, et cetera, of the 19 manufacturer's warning, whether in a manual or 20 on product? 21 A. Yes. 22 Q. Can you tell me which ones? 23 A. Starting on my copy it's the 24 first one, 2012, that's the Power vs.</p>
<p style="text-align: right;">Page 42</p> <p>1 A. He wasn't wearing a helmet. 2 Q. But neither of those dealt with 3 warnings -- did either of those deal with 4 warnings? 5 A. Well, they didn't deal with 6 product warnings, per se. The Vivitoe issue 7 was an issue of the failure of the lights on 8 the back of the trailer to provide adequate 9 warning as to the stopped state of the tractor 10 trailer. 11 Q. Did any of this testimony deal 12 with motorcycle warnings? 13 A. Warnings on the motorcycle 14 itself? 15 Q. Yes, or related to the 16 motorcycle? 17 A. Nothing in the Vivitoe matter. 18 The warnings related to the signals on the 19 back of the trailer of the truck. 20 The Ortega matter, I don't 21 recall if the issue was -- I don't recall if 22 the -- I don't recall if the issue was 23 related -- part of the issue was related to 24 whether or not Ortega was using his headlight</p>	<p style="text-align: right;">Page 44</p> <p>1 Electrolux North America. The next one is a 2 product warnings case. 3 Q. Tell me about Power, what was 4 the issue in Power? 5 A. It was the failure to provide 6 adequate warning on a clothes dryer regarding 7 a lint fire hazard associated with the design 8 of the dryer. 9 Q. And you were retained by whom? 10 A. Looks like American Family 11 Mutual Insurance Company. 12 Q. What was your opinion? 13 A. All of them? 14 Q. Give me the thumbnail. 15 A. That the manufacturer failed to 16 provide adequate warning. 17 Q. And what was your solution? 18 A. The solution was to provide 19 adequate warning. 20 Q. In what method? 21 A. In had to do both with the 22 design of the product and the supplementation 23 of that design with an on-product warning or 24 the failure to provide a design solution</p>

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<p style="text-align: right;">Page 45</p> <p>1 adding a warning to the product. 2 Q. Did that go to trial or is that 3 still active? 4 A. That one settled. 5 Q. Okay. What was the next one? 6 A. Next one is Royal Indemnity 7 Company vs. Crane Company, et al. 8 Q. Okay. 9 A. The next one is -- 10 Q. Tell me about it. 11 A. That one was a product warning 12 case. I think that was fiber reinforced 13 plastic panels that were installed in an oven 14 room of a manufacturer of chicken nuggets, I 15 believe, food processor. 16 Q. And you were retained on behalf 17 of whom? 18 A. One of the insurance companies 19 for the company, the manufacturer or -- not 20 the manufacturer of the product, the 21 manufacturer of the chicken processor is 22 probably a good way to put it. 23 Q. Is your conclusion that 24 whatever warning was at issue was satisfactory</p>	<p style="text-align: right;">Page 47</p> <p>1 looking at product warnings or are we looking 2 for warnings in general? 3 Q. Looking for product warnings. 4 A. Okay. I'm counting 15. I 5 would say 15. 6 Q. Can you identify which ones? 7 A. Sure. So we did the two. The 8 next one is 5/12 Jessica Durkin v. Paccar, 9 Incorporated. The next one is also -- 10 Q. Can you tell me what the 11 product was? 12 A. That was a bulkhead, aluminum 13 bulkhead, I believe it was an aluminum 14 bulkhead on a flatbed trailer. 15 Q. Okay. 16 A. The next one is also in May of 17 2012, Kleiman vs. Jay Peak, Incorporated. 18 Q. What was the product? 19 A. That was a gas fireplace. 20 Q. If I say generically, on the 21 Durkin case, you were retained on the side of 22 the Plaintiff? 23 A. Yes, I was retained on behalf 24 of the deceased Plaintiff, estate of.</p>
<p style="text-align: right;">Page 46</p> <p>1 or unsatisfactory? 2 A. I'm going to say they didn't 3 provide warning as to the fire hazard 4 associated with the use of the panels they 5 were selling with it. That was part of the 6 problem. 7 Q. What was the next case? 8 A. Jessica Durkin vs. Paccar, 9 Incorporated, et al. 10 Q. Are all of these -- would you 11 say all of these are warnings cases for 12 products? 13 A. No. 14 Q. Okay, go ahead. How many would 15 you say there are? 16 A. I can count them. 17 Q. Go ahead, why don't you count 18 them. 19 A. Do you want me to start from 20 the top or do you want me to count the ones we 21 already talked about? 22 Q. We got two. You can begin at 23 three. 24 A. Now, just to clarify, are we</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. The Kleiman case on behalf of 2 the Plaintiff? 3 A. Retained on behalf of the 4 Plaintiff's parents. 5 Q. Okay. What's next? 6 A. 10/2012, Mitchell Robinson, et 7 al. vs. YJ USA Corporation doing business as 8 JumpKing. 9 Q. Okay. What was the product? 10 A. That was a trampoline. 11 Q. And what was your -- were you 12 retained on behalf of the Plaintiff? 13 A. Yes. 14 Q. Okay. Next? 15 A. January 2013, it looks like 16 John and Emily McGrath vs. Rust-Oleum 17 Corporation. 18 Q. Product? 19 A. Yes. 20 Q. What type? 21 A. That I think that was a stain. 22 Q. Were you retained on behalf of 23 the Plaintiff? 24 A. Yes.</p>

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<p style="text-align: right;">Page 49</p> <p>1 Q. Next, please. 2 A. Jacqueline Down and IDA Wescott 3 vs. USC. 4 Q. What was the product? 5 A. That was a pole vault mat. 6 Q. Okay. And were you retained 7 behalf of Plaintiffs? 8 A. Yes. 9 Q. Okay. What is next? 10 A. I think, I'm not a hundred 11 percent sure, but I think Megan Smith vs. In 12 Gear Fashions was a warnings case. 13 Q. What was the product? 14 A. It would be clothing. I don't 15 remember exactly what article of clothing. 16 Q. Were you retained on behalf of 17 the Plaintiff? 18 A. I'm going to guess yes. 19 Q. What would the next one be? 20 A. February 2004, Jesus Flores v. 21 Alexander Andrew, doing business as Fall 22 Tech. 23 Q. You said 2004, you meant 2014? 24 A. You're correct.</p>	<p style="text-align: right;">Page 51</p> <p>1 Q. Were you retained on behalf of 2 the Plaintiffs? 3 A. Yes. 4 Q. What would the next one be? 5 A. Virginia and Robert Nester v. 6 Textron, Incorporated. 7 Q. Okay. What was the product 8 involved? 9 A. That's a golf car. 10 Q. Golf cart? 11 A. Golf car. 12 Q. Car? 13 A. Car. 14 Q. Like you drive around on the 15 golf course? 16 A. Yes. 17 Q. Were you retained on behalf of 18 the Plaintiff? 19 A. Yes. 20 Q. What was the issue in that 21 case? 22 A. The issue was -- that I was 23 asked to address? 24 Q. Yes.</p>
<p style="text-align: right;">Page 50</p> <p>1 Q. What was the product? 2 A. That was a fall arrest system. 3 Q. Like a harness? 4 A. Well, it was the complete 5 system. I'm trying to think now if that 6 actually involved an on-product warning. So 7 we'll put that in the maybe category. 8 Q. Okay. Were you retained on 9 behalf of the Plaintiff? 10 A. Yes. 11 Q. Okay. What would the next one 12 be? 13 A. Next one that I see is March 14 2015, Member Select Insurance Company vs. 15 Electrolux Home Products and Sears. 16 Q. What was the product involved 17 in that? 18 A. That was a clothes dryer. 19 Q. What was the issue? 20 A. Multiple issues, but failure to 21 warn. Failure to provide adequate on-product 22 warning was one of the issues. 23 Q. Was that a dryer fire? 24 A. Yes, lint dryer fire.</p>	<p style="text-align: right;">Page 52</p> <p>1 A. The failure of the on-product 2 warning to effectively and adequately 3 communicate the risks that were involved with 4 the incident. 5 Q. What was the risk? 6 A. Inadvertent activation of the 7 golf cart. 8 Q. Okay. What was the next one? 9 A. The next one looks to be June 10 2016, Westfield Insurance vs. Modern Glass 11 Paint and Tile Company. 12 Q. What was the product about? 13 A. That may have been a stain as 14 well. 15 Q. Were you retained on behalf of 16 the Plaintiff? 17 A. Yes. 18 Q. What's the next? 19 A. August 2015, United Preferred 20 Insurance Company vs. Electrolux North 21 America. 22 Q. What was the product involved? 23 A. Clothes dryer. 24 Q. Lint fire?</p>

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<p style="text-align: right;">Page 53</p> <p>1 A. Lint dryer fire, yes. 2 Q. Were you retained on behalf of 3 the Plaintiff? 4 A. Yes. 5 Q. What's next? 6 A. Kelvin and Krystle Carr vs. 7 Taylor Industries, LLC. 8 Q. What product was involved? 9 A. That was an oil well service 10 rig. 11 Q. Were you retained on behalf of 12 the Plaintiff? 13 A. Yes. 14 Q. Next one? 15 A. That's it. 16 Q. You had said 15, I counted 14. 17 A. Yes, I told you I thought it 18 was about 15. 19 Okay. Well, I'm not going to 20 cross-examine you on that. If I did, I don't 21 think I'd win the case. 22 Have you ever been precluded 23 from testifying by a Court? 24 A. Sure.</p>	<p style="text-align: right;">Page 55</p> <p>1 A. Well, I've had multiple Daubert 2 challenges that have been successfully 3 overcome in the last dozen years. 4 Q. I'm talking about the one that 5 you were precluded. 6 A. That one was either Connecticut 7 or New York. 8 Q. If New York, the Southern 9 District? 10 A. I don't remember whether it was 11 New York or Connecticut. I don't remember 12 which particular district. 13 Q. Have you been precluded any 14 other times? 15 A. The only other thing I can 16 remember was after -- I was in trial in 17 Florida State Court and the defense objected 18 to my testimony and the Judge had me go and 19 direct the Plaintiff outside the Jury's 20 purview, and then ruled afterwards that he 21 wasn't going to let any expert testify. 22 So, I think that would preclude 23 me from testifying. But I don't think it had 24 anything to do with my testimony. The Judge</p>
<p style="text-align: right;">Page 54</p> <p>1 Q. How often? 2 A. There are two Daubert 3 challenges where the Judge ruled that I would 4 not be allowed -- actually, one Daubert 5 challenge where they would not allow me to 6 testify in a case. 7 And then there was a case in 8 Virginia State Court where a Judge wouldn't 9 let me testify because she felt the state of 10 Virginia didn't recognize the field of or 11 science of human factors. 12 Q. Are either of those on your 13 Testimony List? 14 A. No. 15 Q. They preceded that or did you 16 not give testimony? 17 A. The Daubert case was 2004 where 18 the Judge ruled that the field of psychology 19 was nothing more than common sense. 20 Therefore, my opinions were beyond the 21 province of the Jury. The Virginia case was, 22 I'm going to say, around the 2010 time frame. 23 Q. What Federal Court was the 24 Daubert challenge?</p>	<p style="text-align: right;">Page 56</p> <p>1 felt it was a veracity issue between the 2 Plaintiff and Defendant, so he wasn't going to 3 let any expert testify. 4 Q. Any others? 5 A. Not that I can recall. 6 Q. Have you ever been -- have you 7 ever had any portion of your testimony 8 restricted going into trial by Daubert or any 9 other reason other than what you just told me? 10 A. I'm pretty sure my testimony is 11 always restricted to what my opinions are in 12 my field. 13 Q. Do you know what I mean by that 14 question? 15 A. You're saying that -- 16 Q. Someone filed a Motion and said 17 I want to preclude him and the Judge precluded 18 some of it, but not all of it? 19 A. The only time -- if they were 20 the opinions I was planning on giving, the 21 Judge wouldn't let me give all them, the only 22 time I can remember was a Court in Maryland 23 involving a bicycle collision where the 24 bicyclist hit a defect in the sidewalk, and I</p>

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<p style="text-align: right;">Page 57</p> <p>1 think the Judge only allowed me to testify on 2 certain -- or only provide certain opinions of 3 the substantive opinions that I planned to 4 give. 5 Q. Do you know why you were 6 restricted? 7 A. I don't know why. 8 Q. Well, do you know whether you 9 were restricted because your opinions were not 10 scientific? 11 A. I don't believe that my 12 opinions have ever been found to be not 13 scientific. 14 Q. Has any of your testimony, to 15 your knowledge, been stricken after you have 16 testified by a trial judge or subsequently on 17 appeal? 18 A. No. 19 - - - 20 (Whereupon, a short break was taken at 21 this time.) 22 - - - 23 THE WITNESS: I remembered 24 another Daubert challenge in Virginia State</p>	<p style="text-align: right;">Page 59</p> <p>1 about? 2 A. I believe so. 3 Q. What does that mean, what are 4 those articles? 5 A. Generally, it's an issue with 6 the way manufacturers provide information in 7 manuals. These were studies that looked 8 at -- they were for power tools, there were 9 multiple power tools and they were UL listed 10 power tools. And UL has a certain set of 11 requirements for warnings to be presented in 12 the literature for the particular product to 13 be UL certified. 14 The problem is that the 15 manufacturers are taking that list of warnings 16 and dropping them in within the order that UL 17 is providing. 18 Q. Do you mean sort of the 19 numerical order of the UL requirements? 20 A. No. UL has a list of warnings, 21 these warnings have to be in the literature, 22 and they just list them out. There's no real 23 reason or intention for -- on behalf of UL to 24 say this is the order in which you have to</p>
<p style="text-align: right;">Page 58</p> <p>1 Court where the Judge ruled that the hazard 2 was an act of God. Therefore, there was no 3 responsibility on behalf of the manufacturer 4 to provide a warning. 5 BY MR. HEINOLD: 6 Q. So someone filed a Daubert 7 Motion to preclude you and the Judge granted 8 that Motion because he said there was no need 9 for a warning because the event was an act of 10 God? 11 A. Mine and the other expert in 12 the case. 13 Q. Expert for Plaintiff or 14 Defendant? 15 A. Plaintiff, same side. 16 Q. I saw in your C.V. some various 17 publications that are references to what I'll 18 call ordering and prioritizing warnings and 19 product manuals? 20 A. Okay. 21 Q. Does that sound correct, my 22 general statement? 23 A. Sure. 24 Q. You recognize what I'm talking</p>	<p style="text-align: right;">Page 60</p> <p>1 present the warning. It's just these are the 2 list of warnings you have to present. 3 The problem with it is that a 4 lot of UL warnings are what we would consider 5 common sense, warnings that people would have 6 information on. So, for example, don't 7 submerge an electrical product into water, 8 that's a fairly well-known warning dealing 9 with electrical tools. So why should that be 10 first on the list. 11 Later on in the list and other 12 warnings that the manufacturer give that 13 product specific are lesser known hazards, 14 lesser known instructions, lesser known 15 information, and they tend to be populated at 16 the bottom of the list. 17 One of the things we know from 18 a warnings perspective is if you give people 19 warnings that they're well aware of at the 20 start of a list or at the start of a 21 publication they're going to stop reading it 22 because they're going to think that it's 23 information they already know or have or 24 self-evident and therefore, there's no reason</p>

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<p>1 to spend the time reading through an entire 2 list of obvious information. 3 So if you want to get the user 4 to read and understand information that is 5 specific to your product or unique to your 6 product, you need to provide it higher in that 7 prioritization or make it more of a priority 8 in the way you're presenting it in the manual. 9 Q. Were there rules about that? I 10 mean, did you come to conclusions about how to 11 prioritize it? 12 A. There are conclusions in the 13 studies. Typically, I suggest in the study 14 that you put information that people are not 15 aware of, not open and obvious, not commonly 16 known first, present that information first so 17 the user will recognize that they're getting 18 information that they didn't know, information 19 that is important, that it's filling knowledge 20 gaps and that it's worthwhile to continue 21 reading. 22 Q. Those were studies that you 23 did? 24 A. Yes.</p>	Page 61	Page 63
<p>1 Q. And you did those while at NC 2 State as a graduate student? 3 A. Yes. 4 Q. I didn't see any other 5 publications on that topic of prioritizing in 6 manuals, warnings in manuals, except for two, 7 1997, 1996. Did I miss any? 8 I mean, when I asked the 9 question about prioritization you went to 10 those studies. 11 A. The first two that are related 12 to the prioritization of warnings and product 13 manuals are Vigilante 1998 and Vigilante 1997, 14 and then should be a -- 15 Q. Okay. That's on Page 6, 1998, 16 Product manual safety warnings effective 17 ordering? 18 A. Yes. 19 Q. And 1997, okay. 20 A. Okay. Then on the next page, 21 Vigilante, Wogalter 1997 on the prioritization 22 of safety warnings in product manuals. And 23 then there's Vigilante, Wogalter 1996, 24 Ordering of safety warnings in product</p>	Page 62	Page 64

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<p>1 directions and contraindications, the user 2 doesn't have to go searching for it. They're 3 more likely to see it and they're more likely 4 to read it.</p> <p>5 Q. So, for example, a bottle of 6 aspirin, you're talking about putting it on 7 the bottle?</p> <p>8 A. Yes.</p> <p>9 Q. Not the box, not the inserts?</p> <p>10 A. Well, I think the requirements 11 for the box and the insert -- excuse me, the 12 box and the bottle are the same because a lot 13 of medications, over-the-counter medications 14 are sold just in a container, not a box, 15 although some are sold in the box, the 16 container in the box.</p> <p>17 Q. All right. I read your report, 18 you listed the things that you reviewed and 19 relied on. Is there anything that you didn't 20 list that you reviewed or relied on?</p> <p>21 A. As far as discovery material, I 22 list everything in here that I reviewed for 23 this case. As far as specific references used 24 to support my opinions, I provided them in</p>	<p>Page 65</p> <p>1 Q. It's kind of hard for me to 2 question you about it if it's on the thumb 3 drive.</p> <p>4 A. The other stuff I did bring 5 hard copies so we can look at it here.</p> <p>6 Q. Extra hard copies?</p> <p>7 A. Not extra ones. Just one copy.</p> <p>8 MR. LEVINE: I can make 9 copies.</p> <p>10 BY MR. HEINOLD:</p> <p>11 Q. Of what? What did you bring?</p> <p>12 A. So, for example --</p> <p>13 Q. Of the things that are on 14 there?</p> <p>15 A. -- I brought some printouts 16 from websites dealing with winterization of 17 motorcycles, overheating of air-cooled 18 engines, water-cooled engines, et cetera. And 19 then I brought several photographs of 20 different motorcycles. One is a Yamaha YZF, 21 1998, depicting the oil sight glass on the 22 right side of the engine so that when it's on 23 its kickstand the oil doesn't cover the oil 24 sight glass like it does on the incident</p>
<p>1 Section G.</p> <p>2 Other things that I'm relying 3 upon are my education, experience and 4 training. And then I did bring some 5 additional photographs that I did not provide 6 in the report. And I did have a couple other 7 websites that I had looked at, downloaded 8 prior to writing my report that I didn't 9 reference specifically in the report.</p> <p>10 Q. So is this something you can 11 provide me?</p> <p>12 A. Sure.</p> <p>13 Q. That I can see it, or are you 14 going to tell me I have to write it down?</p> <p>15 A. Do you want to see it now or 16 you want it later?</p> <p>17 Q. I don't know what they are.</p> <p>18 A. Sure.</p> <p>19 Q. I mean, we can do it later.</p> <p>20 A. I provided my entire file on 21 the thumb drive. It's my understanding you 22 wanted a copy of my entire file.</p> <p>23 Q. Oh, here (indicating)?</p> <p>24 A. Yes, it's yours to take home.</p>	<p>Page 66</p> <p>1 bike.</p> <p>2 I also photographed warnings 3 that are on the bottom of that motorcycle. As 4 I'm sure one of the things you've asked about 5 was -- for instance, the propensity of 6 likelihood of the manufacturers to put 7 warnings directly on the body of the 8 motorcycle.</p> <p>9 So here's an example of the 10 Yamaha putting a warning sticker right on the 11 fuel tank above the Yamaha YZF sport bike and 12 a warning on the windshield front fairing of 13 the bike.</p> <p>14 Then I brought a photograph of 15 a BMW, 2010 BMW F800 GS showing the dipstick 16 on the left side of the crank case in a 17 similar position, although not exact, same 18 position as the oil sight glass on the 19 incident bike.</p> <p>20 And then I provided just an 21 article from American Motorcyclist in 2007 22 that categorizes the Yamaha YZF and the 23 BMW R1150 R sports bike. So they're in the 24 same category as opposed to my</p>

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<p style="text-align: right;">Page 69</p> <p>1 Harley-Davidson, which is a different category 2 of bike. 3 And then I brought photographs 4 of the control panel console and the steering 5 head of an R1150 R BMW motorcycle and an 6 R1100rsl motorcycle. 7 In my report I discuss 8 alternatives to place the warning on the bike, 9 and I wanted to bring photographs to show the 10 area I was talking about so we are clear and 11 on the same page as to what I was referring to 12 in the report. 13 Q. Is all of this information that 14 you just generalized for me here something you 15 had prior to writing your report? 16 A. I had everything except for the 17 photographs of the Yamaha YZF and photographs 18 of the F800 GS. Just to clarify, I did see 19 both bikes in person prior to writing my 20 report. I didn't photograph them until after 21 writing my report. 22 Q. Okay. Why did you not include 23 those in your report? 24 A. I didn't think it was necessary</p>	<p style="text-align: right;">Page 71</p> <p>1 Q. Other than those additional 2 things, is there anything else in your report 3 that you reviewed or relied for purposes of 4 this case? I'm sorry, that you reviewed or 5 relied on? 6 A. The only additional work I did 7 was review the report of -- I think his name 8 was Mr. Breen? 9 Q. Yes. 10 A. So I think that's the only 11 additional thing I did other than prepare for 12 the deposition. 13 Q. And does the list of the things 14 you reviewed and the report fairly depict all 15 work that you've done to perform -- to prepare 16 your report in this case and reach your 17 opinions? 18 A. I'm not quite sure I understand 19 that. 20 Q. Okay. Tell me what you did to 21 prepare your report. I don't mean sit down 22 and prepare your report, but I mean from the 23 time you were retained in this case -- when 24 were you retained, by the way?</p>
<p style="text-align: right;">Page 70</p> <p>1 at the time. 2 Q. Why do you think it's necessary 3 now? 4 A. Because I knew you would ask me 5 about everything I looked at and I tried to 6 make sure my file was complete as possible. 7 Q. Did you think when you were 8 writing your report I wasn't going to ask you 9 that? 10 A. Typically when I write my 11 report I write it to express my opinions and 12 support my opinions. When I get ready for a 13 deposition I try to anticipate what's going to 14 be asked or required by the opposing attorney. 15 MR. HEINOLD: I would like to 16 get copies of those, Ken. You don't have to 17 do it this minute. You can do it when we take 18 a break. 19 MR. LEVINE: Okay, next break 20 I'll send it out for colored copies. 21 MR. HEINOLD: I am going to 22 want to ask him about that. Having not seen 23 them I'm at a disadvantage at this moment. 24 BY MR. HEINOLD:</p>	<p style="text-align: right;">Page 72</p> <p>1 A. I was officially retained in 2 October of 2015. I should say Vigilante 3 Forensic was retained in I think October of 4 2015. I may have been retained prior than 5 October 2015 when I was with my prior 6 company. I don't have the file from my prior 7 company because I left. So I don't have the 8 inquiry sheet, if it was created before then. 9 Q. Do you have a list of the 10 activities you performed in this case? 11 A. I don't have a list of 12 activities, per se. But typically my reports 13 are written in the way that I can go through 14 the file. 15 So, for example, I'll start 16 with a brief understanding of the issue, and 17 then I'll discuss a purpose to my 18 investigation. That is the hypothesis I want 19 to test, and then I'm provided with the 20 discovery material that's available. I'll go 21 through that material to get a better 22 understanding of the product, of the issue 23 relevant to my purpose, and I'll go through 24 the information to determine what happened and</p>

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<p style="text-align: right;">Page 73</p> <p>1 how it happened. 2 So, for example, Mr. Yazdani's 3 testimony as to what he did, why he did, how 4 he did it. And then I go through my analysis, 5 and in going through my analysis I corporate 6 my education, training and experience to 7 determine and test my hypothesis. 8 So the first thing I addressed 9 was did BMW provide adequate warning? My 10 analysis goes through the steps on how I came 11 to my conclusions that they failed to provide 12 adequate warning. Then the next thing I did 13 was looked at whether BMW North America was 14 aware of the need to provide on-product 15 warning. 16 Q. I seen your report. We don't 17 have to go through it. 18 I'm interested in, for example, 19 you mentioned that you inspected some other 20 vehicle, some other motorcycles? 21 A. Yes. 22 Q. Okay. And in your report you 23 say you may use as Exhibits as photos -- 24 looking at Page 2, photos of the incident</p>	<p style="text-align: right;">Page 75</p> <p>1 background in I guess design, development and 2 testing of motorcycles. 3 Q. And what did you ask? 4 A. We talked about my experiences 5 and his experiences. We talked a little bit 6 about the use of oil sight glasses in bikes, 7 his experience with them, my experience with 8 them. Just kind of generalities. 9 Q. Did he give you any information 10 you thought useful? 11 A. Yeah, I don't think that he 12 told me anything I didn't know. 13 Q. Where is he? 14 A. He's located in Ohio. 15 Q. You went out there? 16 A. Well, I was out there for 17 another case that he and I were investigating. 18 Q. Where in Ohio? 19 A. He's outside of Columbus. 20 Q. Does he operate a business? 21 A. Yes. 22 Q. What's the name of his 23 business? 24 A. 830 Engineering.</p>
<p style="text-align: right;">Page 74</p> <p>1 motorcycle and exemplar motorcycle. You 2 didn't say that you had looked at other 3 motorcycles. 4 A. I'm sorry? 5 Q. So I'm wondering what other 6 activities that you conducted prior to 7 authoring your report? 8 A. Well, I did -- 9 Q. You reviewed the material that 10 you said was available? 11 A. Yes. 12 Q. What else? 13 A. I looked at the websites to get 14 information on issues that are relevant. I 15 looked at my motorcycle manual. I looked at 16 my motorcycle. I talked to a friend of mine 17 that is an expert in motorcycles. And when I 18 was at his place back in October I looked at 19 his bikes which are the photographs that I 20 took later on. 21 Q. Who is that person? 22 A. Erin Higinbotham. 23 Q. And you say he is? What is he? 24 A. Well, he's an engineer with a</p>	<p style="text-align: right;">Page 76</p> <p>1 Q. 8-3-0? 2 A. Correct. 3 Q. What town? 4 A. I'm going to say Milford 5 Center. 6 Q. I'm sorry, I interrupted your 7 answer to ask that question. Go ahead. 8 A. I don't know where I was. I 9 kind of lost track. 10 MR. HEINOLD: Do you want to 11 read it back. 12 --- 13 (Whereupon, the court reporter read the 14 pertinent information.) 15 --- 16 THE WITNESS: Okay, so I did 17 that. I did look at the websites, and I don't 18 recall if I asked friends that are 19 motorcyclists their understanding of the 20 potential -- if they understood that there was 21 a potential fire hazard associated with 22 leaving their bike idling, what their 23 practices were with respect to leaving it 24 idle. I just don't recall specific instances,</p>

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<p style="text-align: right;">Page 77</p> <p>1 but it's possible that I did. 2 BY MR. HEINOLD: 3 Q. You may have talked to some of 4 your friends? 5 A. Sure. 6 Q. Or you did? 7 A. I'm saying I may have because I 8 typically -- because typically if I'm involved 9 in a case that is either a common product or a 10 product that has a -- people that I knew that 11 you used them, you know, I'll talk to them 12 about my case and explain a little bit about 13 it, kind of get their feedback on what their 14 practices and knowledge were. Just kind of a 15 general research, if you will, not something 16 that I'm specifically relying upon for my 17 opinions. Just kind of general background. 18 Q. Anything else? 19 A. I think that would be it. 20 Q. On Page 6 of your report -- 21 wait a minute, Page 5 of your report, Section 22 E, talking about providing an adequate 23 warning. 24 MR. LEVINE: Off the record a</p>	<p style="text-align: right;">Page 79</p> <p>1 understanding the design decisions and choices 2 that were available or made. 3 Q. Okay. Well, I understand, for 4 example, the product hierarchy, there is a 5 design and you should try to design out the 6 hazard. If you can't, then you offer a 7 warning. They're two separate issues. 8 A. Well, they're not separate 9 issues. 10 Q. Well, let me just finish. I 11 understand that the design issue is a 12 predicate for the warning, right? 13 A. Yes. So the design of the BMW 14 creates a potential for a hazardous situation, 15 that is the potential for fire. There was 16 choices that BMW made in the design of the 17 bike that could have eliminated that 18 potential. They chose not to. If they're 19 going to not eliminate through design, they 20 have the option of safeguarding it. 21 I think that Mike Zazula 22 addressed some of those issues guarding it 23 with the use of the optional police fan kit. 24 I don't recall offhand if he had an issue with</p>
<p style="text-align: right;">Page 78</p> <p>1 second. 2 --- 3 (Whereupon, a discussion was held off 4 the record.) 5 --- 6 BY MR. HEINOLD: 7 Q. The warning that you cite in 8 the manual you talk about Mr. Yeldham's 9 testimony and you talk about Mr. Zazula's 10 report in the next paragraph. 11 A. Okay. 12 Q. Now, I had asked you about the 13 scope of your expertise as a motorcycle design 14 expert, you said -- your Counsel said you're 15 going to be sticking within your report. 16 Are your references here to 17 those things references to the need for a 18 warning as compared to a criticism of the 19 design other than a warning? 20 A. Yes. So my opinions are 21 both. So the need for a warning is dependent 22 upon the design choice that BMW made or BMW 23 North America made. So you can't have 24 opinions with respect to warnings without</p>	<p style="text-align: right;">Page 80</p> <p>1 respect to the monitoring of the engine 2 temperature, potential shutting it down if it 3 got too hot. But certainly, those are 4 guarding solutions that were available to BMW 5 to my understanding and they chose not to do 6 that. 7 And then so they relied upon a 8 warning as their mitigation strategy. And my 9 opinion is that reliance on that warning was 10 inappropriate in that the warning they 11 provided was inadequate. And that if they 12 were going to rely upon the warning, solely 13 upon the warning, they needed to provide it on 14 the motorcycle itself like they did with the 15 recall motorcycle a few years prior because of 16 the unique characteristic of the potential 17 fire hazard with the design of this bike. 18 Q. I understand that. My question 19 is: Are you going to criticize the design as 20 a design? Are you going to say the 21 motorcycle -- forget the warnings. Are you 22 going to say I'm the motorcycle expert and 23 this motorcycle is defective because it had a 24 sight glass in this location and I'm offering</p>

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1 an alternative? 2 A. No. My opinion is that because 3 of the way they designed it, they created a 4 potential fire hazard, and as such they had a 5 responsibility to mitigate that, and they 6 could have mitigated it through design or 7 guarding. If they weren't doing to do that, 8 they should have at least provide adequate 9 warning, and the warning that they did chose 10 to provide was inappropriate and inadequate. 11 Q. Are you offering an opinion 12 that the design of the motorcycle beyond the 13 warning is defective and unsafe? 14 A. I think that they were -- 15 excuse me, I think that they already 16 established that. I'm not establishing the 17 fact that oil sight glass or its position in 18 its composition failed meeting to a 19 catastrophic event. That's why I'm citing 20 Mark Yeldham, his testimony, to establish 21 that. 22 So I'm not planning on 23 establishing that on my own. I'm using his 24 testimony to establish that there was a hazard	1 MR. LEVINE: Oh, okay. 2 MR. HEINOLD: I'm with you a 3 hundred percent. There's a warning that says 4 here's a hazard, don't do this, and that's 5 what we're here about. 6 But your last statement that 7 he's going to say if you had a different 8 design you wouldn't have the hazard, he 9 doesn't have that in his report. And if you 10 are going to declare him to be a motorcycle 11 design expert, then we'll see if he 12 qualifies. But that is the next step. 13 MR. LEVINE: The part that you 14 don't agree with me on, let me just address 15 that just for a second, I'm rather confident 16 that your own client who designed the bike 17 would say that if designed differently, as 18 some other vehicles are designed, that that 19 precise hazard would not exist. It's just a 20 nature of the design of that particular bike. 21 So I don't think it requires 22 him to be an expert, although he probably has 23 enough of that expertise to say that 24 statement, that if it was designed differently
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1 due to the design of this bike. 2 Q. Okay. 3 MR. HEINOLD: Ken, do you 4 understand my question? 5 MR. LEVINE: I do. I think 6 that you're asking him to disconnect 7 something -- let me start off, you can keep 8 this on the record. Inevitably he has to say 9 that the design resulted in a hazard. I don't 10 think that he is opining that personally other 11 than through the acceptance of statements by 12 folks at BMW and other experts that such a 13 hazard simply exists based on it. 14 I don't think he's going to 15 come in, and correct me if I'm wrong, and 16 testify that the design in and of itself 17 should have been different. But he will say 18 the obvious, which he's already stated, that 19 if it did not have that design it would not 20 have that hazard. 21 So you're asking him is he an 22 expert in that area? 23 MR. HEINOLD: See, I don't know 24 that I can agree with your last statement.	1 it would not have that hazard. I doubt your 2 client or you when you pause for a second 3 would disagree with that statement. So that's 4 all that he would be saying, I believe, and he 5 can answer for himself. 6 So when you say is he a 7 motorcycle expert as to the design or whether 8 or not the design generated that hazard, I 9 believe that everybody involved knows that the 10 design generated that hazard. So I'm not 11 sure -- I'll be happy to continue. 12 MR. HEINOLD: I will say this, 13 I don't disagree with you that it has a design 14 and that design can lead to the consequences 15 of a fire if you leave it idling at 16 standstill, because there's a hazard 17 recognized and a warning in the manual to that 18 effect. 19 MR. LEVINE: Then a safety 20 engineer or an ergonomic expert will 21 inevitably say every single time you've got 22 this hazard that I've been asked to address, 23 but that integral with that opinion is the 24 straightforward statement that if it had been

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<p style="text-align: right;">Page 85</p> <p>1 designed differently, it's not the case with 2 all products, but if it was designed 3 differently it would not have that hazard. 4 MR. HEINOLD: And what's the 5 different design he's going to say it should 6 be? 7 MR. LEVINE: Oh, he's not going 8 to say it should be because there's six 9 million ways to build a motorcycle, and some 10 of them will have that hazard, some of them 11 will not have that hazard based on their 12 design. 13 I think that -- again, I 14 welcome his contribution to the conversation, 15 but I think his opinion is that when a 16 motorcycle is designed in this fashion, if the 17 manufacturer chooses to allow this hazard to 18 exist, because the nature of the design of 19 this motorcycle, not unlike every other 20 motorcycle, but the design of this type of 21 motorcycle generates this hazard, and once 22 they decided to have that design, which would 23 generate this known hazard, then they must do 24 X, Y and Z, but they are not guiltless --</p>	<p style="text-align: right;">Page 87</p> <p>1 if he has opinions with regard to other 2 designs that would not generate the hazard. 3 You can ask him whatever 4 questions you'd like to ask him. I've tried 5 to answer I think the conflict between you as 6 best I can. 7 MR. HEINOLD: Well, I think 8 your position tries to turn him into a design 9 expert, which he doesn't have in his report. 10 MR. LEVINE: I think the scope 11 of his opinions that he will say at trial with 12 regard to design and hazard generation as a 13 result of this design are stated in his 14 opinion and will be the testimony at the time 15 of trial. 16 But if you want to explore 17 that, if you feel as if he's going to give 18 testimony at trial beyond the scope of his 19 abilities or the scope of his report, I 20 certainly appreciate that, and an issue will 21 arise that we're going to have to address. 22 But I think that your questions may eliminate 23 that concern. 24 BY MR. HEINOLD:</p>
<p style="text-align: right;">Page 86</p> <p>1 that's a horrible lawyer word that I'm using. 2 They're not guiltless deciding, all right, 3 we're going to design it to allow this hazard 4 to exist. 5 MR. HEINOLD: You have an 6 expert who has addressed the design issues. 7 MR. LEVINE: Yes, we have. 8 MR. HEINOLD: And this witness 9 has addressed the warning issues given the 10 design. 11 MR. LEVINE: You have just 12 limited, frankly, the scope of his testimony. 13 He was asked to analyze the safety. You want 14 to say he was asked to analyze the warning. I 15 think any ergonomic expert is going to be 16 asked to analyze the safety. Integral to that 17 is a review as to the hazard and what causes 18 them, first and foremost, and that inevitably 19 goes back to the design. 20 So it would be impossible for 21 him to say I'm analyzing the safety that led 22 to fire, that he did not look at the design, 23 the design options and whether or not they 24 created a hazard. I don't -- you can ask him</p>	<p style="text-align: right;">Page 88</p> <p>1 Q. Do you consider yourself a 2 motorcycle design expert? 3 A. It depends on the specific 4 topic. 5 Q. How about on the location of 6 sight glasses, are you an expert in the 7 location and use of sight glasses for oil 8 systems? 9 A. It depends on the question. So 10 maybe I can short circuit this. I do not plan 11 on providing an alternative design solution. 12 So I would leave that to Zazula and Yeldham 13 and anybody else that testifies. 14 My opinion is simply that it's 15 my understanding that bikes that are designed 16 differently don't have this hazard. If you're 17 going to choose this design that creates this 18 hazard you need to A, accept that you're doing 19 it, and then B, think about providing a 20 different design. 21 If you can't provide a 22 different design for whatever reason, you have 23 to decide whether or not you're going to 24 provide a safeguard to prevent the hazard from</p>

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<p>1 occurring that is inherit in your design. And 2 if you're not going to do that, then you need 3 to provide an adequate warning. 4 My opinion is that instead of 5 providing a design that doesn't create the 6 hazard, BMW, for whatever reason, I don't know 7 for whatever reason, given the hazard, chose 8 to leave it in the design of the bike. They 9 didn't provide a safeguard to prevent the 10 hazard from occurring.</p> <p>11 It would be my opinion if asked 12 that it's unreasonable if the safeguard is 13 available and feasible, I didn't do the 14 analysis of what they should be, that's for 15 Mike Zazula to determine, but my opinion is 16 simply that if it's available and it's 17 feasible, it should have been used rather than 18 relying upon a third option. If they have a 19 hazard because of the design and they're not 20 going to safeguard it, the least they can do 21 is provide adequate warning.</p> <p>22 My opinion in this case is that 23 they failed to provide adequate warning. If 24 they're going to solely on the warning, what</p>	<p>1 A. The Owner Manual does attempt 2 to address it. 3 Q. Okay. I'm not trying to say 4 there isn't a hazard. I'm acknowledging that 5 what has been said about what can occur if the 6 operator does certain things can occur, and 7 there's a warning about that. I'm not arguing 8 the merits of the warning. I'm saying it's 9 there, so therefore the characteristic is 10 known. 11 You're going to say, as I 12 understand it, that if you have that 13 characteristic the first thing you should do 14 is -- 15 MR. LEVINE: Consider. 16 BY MR. HEINOLD: 17 Q. -- to consider is to have a 18 design that doesn't present that 19 characteristic. That you're going to leave 20 that fight to other experts; correct? 21 A. Yes, I'm going to leave -- I'm 22 not offering a design solution. But the 23 problem is that the design of the bike is 24 unique in that it creates a fire hazard that</p>

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<p>1 A. Sure he did.</p> <p>2 Q. What did he say?</p> <p>3 A. Mr. Yeldham testified that if</p> <p>4 BMW R 1150 R motorcycle is left idling in a</p> <p>5 stationary position the oil sight glass cover</p> <p>6 can fail and cause a fire.</p> <p>7 Q. That's the extent of what</p> <p>8 you're going to talk about there?</p> <p>9 A. I mean, he goes on. I'm citing</p> <p>10 the rest of that paragraph as to why this is a</p> <p>11 problem. I mean, he's acknowledging in that</p> <p>12 testimony that there is a hazard associated</p> <p>13 with the oil sight glass cover. And if you</p> <p>14 don't have the oil sight glass cover it can't</p> <p>15 fail, and if you have a dipstick you don't</p> <p>16 have an oil sight glass cover. And therefore,</p> <p>17 from the oil sight glass cover can't fail.</p> <p>18 Q. Okay. So are you going to</p> <p>19 offer an opinion about it should have had a</p> <p>20 dipstick?</p> <p>21 A. No, I am not, but my opinions</p> <p>22 because of the unique characteristics of this</p> <p>23 bike users don't understand or appreciate it</p> <p>24 because it's abnormal, atypical due to the</p>	<p>Page 93</p> <p>1 sight glass, but it's on the right side of the</p> <p>2 crank case that when it's on its left</p> <p>3 kickstand the oil isn't covering the oil sight</p> <p>4 glass.</p> <p>5 And Mark Yeldham testified that</p> <p>6 part of the reason why the oil sight glass may</p> <p>7 fail is because when its on its left kickstand</p> <p>8 the oil, hot oil covers the oil sight glass.</p> <p>9 So to me intuitively that means that if it's</p> <p>10 on the right side and it's not covering the</p> <p>11 oil sight glass it can't cause it to fail in</p> <p>12 that manner.</p> <p>13 Q. Are you planning to offer the</p> <p>14 opinion that the oil sight glass on this</p> <p>15 motorcycle should have been on the right side,</p> <p>16 not the left?</p> <p>17 A. I do not plan on providing an</p> <p>18 alternative design to this bike.</p> <p>19 Q. And I think we've already</p> <p>20 agree, but I want to be clear, you're not</p> <p>21 planning on design that says there should be a</p> <p>22 dipstick instead of an oil sight glass?</p> <p>23 A. I was not planning on offering</p> <p>24 an opinion with respect to alternative design.</p>
<p>Page 94</p> <p>1 unique or due to the design of this bike.</p> <p>2 Q. Is there anything else that you</p> <p>3 consider abnormal or unique?</p> <p>4 A. Other than the fact that the</p> <p>5 oil sight glass cover can fail and cause a</p> <p>6 fire, that's the only thing that's relevant to</p> <p>7 this incident.</p> <p>8 Q. Are you aware of any --</p> <p>9 A. Well, I take that back, because</p> <p>10 apparently to prevent the fire due to the</p> <p>11 design BMW wants you to ride away immediately</p> <p>12 and that, again, is a unique or atypical trait</p> <p>13 associated with this bike.</p> <p>14 Q. Anything else?</p> <p>15 A. Not that I can think of at the</p> <p>16 moment.</p> <p>17 Q. Have you done a survey on</p> <p>18 motorcycles?</p> <p>19 A. I've not surveyed every</p> <p>20 motorcycle ever available, but I've looked at</p> <p>21 a lot of bikes over a lot of years and most of</p> <p>22 them have dipsticks.</p> <p>23 Q. Any that don't other than BMW?</p> <p>24 A. Well, the Yamaha has an oil</p>	<p>Page 94</p> <p>1 MR. LEVINE: I'm compelled to</p> <p>2 step in. He has said a number of times that</p> <p>3 he does not intend to present alternative</p> <p>4 design. I just want to clarify that in one</p> <p>5 way. Some people view warnings provided on a</p> <p>6 product as an alternative design. I just</p> <p>7 wanted to mention that so there's no lack of</p> <p>8 clarity.</p> <p>9 And I would ask that we pause</p> <p>10 so I can go do and get those menus.</p> <p>11 MR. HEINOLD: Can I just finish</p> <p>12 this?</p> <p>13 MR. LEVINE: Sure.</p> <p>14 MR. HEINOLD: And I understand</p> <p>15 what you say about the warning issuing</p> <p>16 wasn't -- that's not a problem. I didn't take</p> <p>17 it that way.</p> <p>18 MR. LEVINE: Okay.</p> <p>19 MR. HEINOLD: We do have a</p> <p>20 report full of --</p> <p>21 MR. LEVINE: Of warning</p> <p>22 issues.</p> <p>23 MR. HEINOLD: Of warning</p> <p>24 issues.</p>

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<p style="text-align: right;">Page 97</p> <p>1 BY MR. HEINOLD:</p> <p>2 Q. Do you plan -- I want to create 3 a distinction between pointing out 4 characteristics that others have identified, 5 BMW and Mr. Zazula, and you personally 6 criticizing them yourself, do you plan on 7 criticizing the design, not the warning 8 issues, the design of this motorcycle or 9 simply point out based on what others have 10 said that these characteristics lead to this 11 hazard and either should be prevented or a 12 better warning, here's what I think is a 13 better warning?</p> <p>14 A. I think the best way to answer 15 is that I'm relying on Yeldham and Zazula and 16 others to identify the hazard associated with 17 this bike and understanding why that hazard 18 occurs with respect to design. I'm not 19 offering an alternative design solution.</p> <p>20 If one is presented to me, I 21 can have opinions with regard to whether or 22 not that would be the appropriate thing to 23 do. So that gets back into this design work.</p> <p>24 As an ergonomist and product safety expert,</p>	<p style="text-align: right;">Page 99</p> <p>1 only appropriate, but the correct thing to do.</p> <p>2 Q. Okay.</p> <p>3 ---</p> <p>4 (Whereupon, a short break was taken at 5 this time.)</p> <p>6 ---</p> <p>7 BY MR. HEINOLD:</p> <p>8 Q. Okay, I think I get it. You 9 said that this design is unique. Is it your 10 understanding that the BMW air-cooled 11 motorcycles are the only motorcycles capable 12 of fire if the customer leaves it idling for 13 an extended period at a standstill?</p> <p>14 A. Yeah, I'm not aware of any 15 other motorcycles that have the same potential 16 fire risk due to the same issue.</p> <p>17 Q. Did you research that?</p> <p>18 A. I did not research it.</p> <p>19 Q. So you can't point me to any 20 source, literature or anything that says that, 21 to support your understanding; it's just your 22 understanding?</p> <p>23 A. Well, I should take that back.</p> <p>24 Part of the research I did was look at the</p>
<p style="text-align: right;">Page 98</p> <p>1 it's my opinion that if an alternative design 2 exists that's feasible that eliminates the 3 hazard, that is the appropriate thing to do.</p> <p>4 So, if someone presents it, 5 whether it's you or Mr. Hughes, at the time of 6 trial, I'm asked that question, that would be 7 my opinion. I'm not going to opine what the 8 alternative should be or the pros and cons of 9 it or how, you know -- because I don't know.</p> <p>10 For example, they could have 11 used a different glass that doesn't deform at 12 329 degrees. Maybe that solves the problem. 13 I'll leave that to, you know, someone else to 14 determine that. If they use a dipstick 15 instead of the sight glass maybe that fixes 16 the problem. I'll leave that to somebody else 17 to determine.</p> <p>18 If you put it on the right 19 side, if they could have put it on the right 20 side, does that alleviate the problem, I'll 21 let someone else determine that.</p> <p>22 But if there is a design 23 solution that eliminates the hazard, it's my 24 opinion that would have been appropriate. Not</p>	<p style="text-align: right;">Page 100</p> <p>1 manuals for other motorcycles to see what they 2 identify as hazards associated with their 3 bikes. Like I said, I went through the Yamaha 4 manuals and the Harley manuals and it wasn't 5 identified as being a hazard with those bikes, 6 in the design of those bikes.</p> <p>7 I'm not aware of it through my 8 experience as being an issue with most bikes. 9 This was the first time I became aware that it 10 was an issue with any bike. And certainly, I 11 understand that there could be fires if a 12 motorcycle is left idling near combustibles. 13 So certainly that was something that I 14 understood, but not that a component on the 15 bike would fail and lead hot oil to escape the 16 engine and ignite and start a fire.</p> <p>17 Q. Okay. But other than your 18 general knowledge and the manuals you 19 reference, is there any other basis for your 20 understanding?</p> <p>21 A. I didn't find anything when I 22 was doing the research on oil cool and letting 23 them sit at a standstill when I did the web 24 research.</p>

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<p style="text-align: right;">Page 101</p> <p>1 Q. Are those the web pages that 2 you're going to provide me with a copy with at 3 some point?</p> <p>4 A. Well, no, I did a web 5 research. These are just some of the pages 6 that I came across that I printed out as some 7 examples of what I was finding on the web.</p> <p>8 Q. Did you find -- did you search 9 for fires for other manufacturers?</p> <p>10 A. I didn't do a specific search, 11 for example, Kawasaki XYZ bike. I just looked 12 at starting at a standstill, cold weather 13 winterization trends, tips, practices. I 14 looked at, like I said, the manuals for the 15 other bikes to see if they were warning 16 against the practice because of a potential 17 fire hazard and I didn't see any.</p> <p>18 Q. You gave me three manuals, 19 three Yamaha and one Harley, were those the 20 manuals that you said you researched?</p> <p>21 A. I do have a couple more Yamaha 22 manuals that I looked at, and Kawasaki, I 23 think. They're on the disk. So whatever 24 manuals I pulled out I put on the disk.</p>	<p style="text-align: right;">Page 103</p> <p>1 have asked Pat Hughes to ask me to provide my 2 references that were cited in my report. 3 So I put together the 4 references that were cited in my report. In 5 my report I cited specific pages to those 6 manuals. So instead of providing the entire 7 manual I provided those specific pages. On 8 the disk I provided the entire manual for the 9 Yamahas, not for the Harley-Davidson because I 10 didn't have the Harley-Davidson in PDF format, 11 I had hard copy. So I had to scan the pages 12 that I was interested in, if that makes sense.</p> <p>13 Q. This flash drive, what's on it?</p> <p>14 MR. LEVINE: I can tell you 15 because I have it open, or you can ask him.</p> <p>16 MR. HEINOLD: Well, I'm going 17 to ask him.</p> <p>18 MR. LEVINE: Okay.</p> <p>19 THE WITNESS: It's all the 20 documents that I have that are related to -- 21 specifically related to this case.</p> <p>22 BY MR. HEINOLD:</p> <p>23 Q. Anything that's not referenced 24 in your report on the flash drive?</p>
<p style="text-align: right;">Page 102</p> <p>1 There was a number -- I'm sorry 2 to interrupt, but there were a number of 3 years. Like I cited the 2002 models and the 4 XVS 1100 and the Road Star XV 16A. There were 5 multiple model years manuals that I had for 6 either one or both of the bikes. I don't 7 recall offhand.</p> <p>8 Q. It was -- well, you provided 9 like a covering page for two different 10 manuals. Do you think there's something more 11 some?</p> <p>12 A. I think I provided the entire 13 manuals for the Yamahas on the disk. The 14 Harley-Davidson Manual I only provided the 15 cover of the page because I would have had to 16 scan the entire thing.</p> <p>17 Q. Well, what is on -- I got a 18 link from your attorney that had the 19 references which you cited. This flash drive 20 that you're providing that's different; 21 correct?</p> <p>22 A. Yes, I'm sorry. The references 23 were to those specific pages. So I think 24 that's why when I -- I don't recall, you may</p>	<p style="text-align: right;">Page 104</p> <p>1 A. Yes.</p> <p>2 Q. What?</p> <p>3 A. Well, for example, the 4 motorcycle pictures that I mentioned earlier.</p> <p>5 Q. Okay.</p> <p>6 A. The websites that I printed 7 that I mentioned earlier. And then like I 8 said, the full manuals for several model year 9 Yamahas. There's a Road Star 2000 Manual, 10 E-Star 2010, E-Max 2011, E-Star 2001 and 11 E-Star 2002. I believe they're the complete 12 manuals, not just pages.</p> <p>13 Q. Anything else on there that 14 wasn't part of your references that I would 15 have received?</p> <p>16 A. I don't believe so. Other than 17 what we talked about, right, the pictures and 18 the --</p> <p>19 Q. Yes, hence the word "else".</p> <p>20 MR. HEINOLD: That's for me, 21 right?</p> <p>22 MR. LEVINE: That is for you.</p> <p>23 BY MR. HEINOLD:</p> <p>24 Q. Let's talk about, you mentioned</p>

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<p style="text-align: right;">Page 105</p> <p>1 the recall motorcycle and the warning on the 2 recall motorcycle. 3 A. Okay. 4 Q. Did you consider that warning, 5 the on-product portion adequate? 6 A. I don't know that I considered 7 that adequate. I don't recall offhand what 8 the warning looked like, number one. So I 9 don't recall if it had the appropriate signal 10 word panel. And two, the language is still a 11 bit -- what's the word I want to use? It's 12 not specific and explicit. 13 Q. What page in your report are 14 you referring to? 15 A. 11. 16 Q. Okay. What is -- I think you 17 said not specific and some other -- 18 A. Explicit. 19 Q. What is not explicit and 20 specific in that language? 21 A. Well, my understanding is that 22 BMW intended -- well, you go down to the -- 23 I'm sorry, you go down to the warning in the 24 manual, it says: Do not keep the engine</p>	<p style="text-align: right;">Page 107</p> <p>1 language from the on-product label that was 2 put on the 1997 motorcycle; correct? 3 A. I'm sorry, I was reading it and 4 I didn't follow your question. 5 Q. Okay. We're on Page 11 of your 6 report, and indented there you have three 7 lines that purport to repeat the language that 8 was on the on-product label as part of that 9 recall? 10 A. Yes. 11 Q. And just below that you have 12 the language that was part of the warning 13 insert to the Rider's Manual? 14 A. Yes. 15 Q. And you were comparing the 16 on-product to the Rider's Manual insert just a 17 moment ago? 18 A. I was -- yes. 19 Q. And you were saying that the 20 on-product label wasn't sufficient, wasn't 21 explicit or specific? 22 A. Yes. 23 Q. And in contrast you referred to 24 the insert?</p>
<p style="text-align: right;">Page 106</p> <p>1 running while the motorcycle is at a 2 standstill - Risk of overheating and fire. 3 Ride away immediately after starting the 4 engine. 5 When you look at the warning 6 that was on the -- they put on the motorcycle 7 itself it says: Avoid increased idle speed at 8 a standstill with choke in use - Risk of 9 overheating and fire. 10 They're two different 11 messages. So the one says -- the one that's 12 on bike says: Avoid increased idle speed at a 13 standstill with choke in use. The other one 14 says: Do not keep the engine running while 15 the motorcycle is at a standstill. Ride away 16 immediately after starting the engine. 17 So if you want them to ride 18 away immediately after starting the engine you 19 need to specifically and explicitly state that 20 in the warning on the product. 21 Q. Okay. Is the warning from the 22 insert -- let's do a little housekeeping. 23 We're looking at Page 11 of 24 your report, and in the middle you have the</p>	<p style="text-align: right;">Page 108</p> <p>1 A. Yes. 2 Q. Is that specific and explicit? 3 A. The information in the insert 4 warning provides more information to 5 understand the hazard and what the issue is 6 and what you need to do to avoid it. 7 Q. So is that sufficiently 8 explicit and specific? 9 A. I think that it's okay for an 10 on-product warning. My opinion would be that 11 if you're going to include that in your manual 12 that you provide additional information to let 13 the user know what the problem is and why it's 14 a problem. So part of the, you know, reason 15 that you provide information in manuals, 16 warnings in manuals is you have more space to 17 provide more information. 18 So as I note in my report on 19 Page 15 that the appropriate thing to do was 20 to repeat the on-product warning in the manual 21 with an explanation of how the fire occurs. 22 Q. So the insert in the manual is 23 okay, it's sufficient if you were going to put 24 that on the product?</p>

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<p style="text-align: right;">Page 109</p> <p>1 A. I think it's better than what 2 they did provide on the product. 3 Q. Is it sufficient? 4 A. If I was designing it I would 5 say you put the one on Page 14 of my report. 6 I think that's specific and explicit and 7 succinct. 8 Q. Do you understand that -- 9 strike that. 10 Do you have an understanding of 11 the issue that led to the recall? 12 A. Yes. 13 Q. What is it, your understanding? 14 A. It looks like there were 15 multiple fires reported to BMW with this 16 particular model motorcycle. They attributed 17 it to the fact that while it was idling at a 18 higher idle than no choke, for example, that 19 the engine was heating up, overheating and 20 igniting the fairing that was adjacent to 21 either the exhaust or the engine itself. 22 Q. Okay. So it was the fairing 23 which was igniting rather than the oil sight 24 glass which was deformed?</p>	<p style="text-align: right;">Page 111</p> <p>1 me ask you. Let me start that over. 2 Do you have an understanding 3 whether as a result of the fairing igniting, 4 whether the design of the BMW motorcycles at 5 issue is changed? 6 A. It's my understanding that the 7 incident bike in the recall was discontinued 8 at some point in time, and then the 1150, 9 R 1150 took its place and that the R 1150 had 10 three different packages, if you will. The 11 one involved in this incident was like a 12 strip-down version. And then the next two had 13 different levels of front bearings and so 14 forth. 15 I think Yeldham testified that 16 there was a potential for the oil sight glass 17 to fail in the 1150 due to the engine 18 overheating at a standstill or the potential 19 for the front fairing and/or wiring harness on 20 the bikes to ignite because of the heat of the 21 exhaust when at a standstill. 22 Q. On the subject motorcycle? 23 A. Not on the subject motorcycle 24 because it didn't have a -- the front fairing</p>
<p style="text-align: right;">Page 110</p> <p>1 A. I think -- my understanding is 2 that at least from the discussions with NHTSA 3 it was the fairing that was igniting due to 4 its proximity to either the exhaust or the 5 engine. They're pointing it to the exhaust 6 system temperature rising considerably 7 increasing the risk of fire. 8 Q. As a result of the fairing, the 9 ignition of the fairing? 10 A. The ignition of the fairing, 11 yes. 12 Q. This did not involve oil sight 13 glass failures? 14 A. That's not what's noted in the 15 NHTSA notification. I don't know if Mark 16 Yeldham testified that the oil sight glass was 17 involved or not. I don't recall offhand. 18 Q. Okay. Do you have any 19 information if the oil sight glass was 20 involved in the recall issue? 21 A. Not based upon the NHTSA 22 document that I have. 23 Q. What is your understanding of 24 what the change in the design would be -- let</p>	<p style="text-align: right;">Page 112</p> <p>1 wasn't near the exhaust, but on the -- there's 2 two other versions of that same bike. I don't 3 remember the names offhand, but they had 4 different levels of the amount of fairing on 5 the front of it. 6 Q. When you say the names, what do 7 you mean? 8 A. Well, the incident bike was the 9 R 1150 R. My understanding is that there were 10 two versions of that bike. There was the 11 R 1150 R, and I don't know what the letter 12 designations were for those other two models. 13 Q. Were you aware of any fires 14 regarding the fairings? 15 A. Apparently one of the other 16 models is the R 1150 GS, and I'm aware of a 17 fire as a result of the oil sight glass 18 failing on that bike. There's an R 1150 80V 19 that also was involved in an oil sight glass 20 fire, oil sight glass failure fire. 21 And it looks like there's a 22 fire involving an R 11 RT that involved an oil 23 leak. It doesn't say whether the oil sight 24 glass failed or not.</p>

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<p>1 Q. These are allegations; correct?</p> <p>2 A. These are a list of claims.</p> <p>3 Q. Right. A claim is an</p> <p>4 allegation?</p> <p>5 A. I don't know if I can agree or</p> <p>6 not agree with that statement.</p> <p>7 Q. Okay. What is that document</p> <p>8 you're looking at?</p> <p>9 A. It's a BMW production document</p> <p>10 summary.</p> <p>11 Q. Prepared by?</p> <p>12 A. Mr. Hughes' office.</p> <p>13 Q. Is that part of what you</p> <p>14 provided me on this flash drive?</p> <p>15 A. It has to be.</p> <p>16 Q. Okay. You hadn't mentioned it</p> <p>17 as one of the -- when I said anything else,</p> <p>18 but it's your book and your --</p> <p>19 A. I think that was part of the</p> <p>20 material reviewed. I'm sorry, I was including</p> <p>21 that under the material available for review.</p> <p>22 Q. Perhaps I didn't notice it. I</p> <p>23 didn't notice it in your materials available</p> <p>24 for review.</p>	<p>1 purposes of your opinions about whether he</p> <p>2 read those or didn't read those?</p> <p>3 A. To me it doesn't matter if he</p> <p>4 read them or didn't read them several years</p> <p>5 before the fire.</p> <p>6 That's one of the limitations</p> <p>7 of providing information and important</p> <p>8 warnings in the manual is that people are</p> <p>9 likely to overlook it, they're likely to</p> <p>10 forget it, and they're likely not to be</p> <p>11 recalling or thinking about it at the time the</p> <p>12 information is needed. Hence the need for an</p> <p>13 on-product warning.</p> <p>14 Q. Is it important to read the</p> <p>15 Manual?</p> <p>16 A. It depends.</p> <p>17 Q. It depends on what?</p> <p>18 A. It depends on whether it's</p> <p>19 required or not to use and operate the piece</p> <p>20 of equipment or machinery.</p> <p>21 Q. How does someone know whether</p> <p>22 it's required until they read?</p> <p>23 A. Well, two things. One is that</p> <p>24 the product may be like other products that</p>

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<p>1 Q. If he did not read, but would 2 have understood it if he had read it, is that 3 important for your opinion? 4 A. I think he testified that had 5 he read it he would have understood it. I 6 think he read it and in his deposition said he 7 understood it. 8 Q. Okay. Is that important to 9 your opinion? 10 A. To me it's irrelevant because 11 he wasn't thinking about it at the time. So 12 that's part of the problem with the warning in 13 the manual, is that people, A, don't read it, 14 B, read it and don't remember it at the time 15 or the location where the information is 16 necessary. 17 Q. If he read it and understood 18 it, forgetting about whether he forgot it or 19 whether he should have been reminded of it, 20 the message in the manual was sufficient at 21 least to be understood as to the activity and 22 the consequences; correct? 23 A. That's what Mr. Yazdani 24 testified, that he understood what the warning</p>	<p>1 incident. He's not sure if he ever read it. 2 Q. Do you think he would have 3 recalled if the warning had been different? 4 A. I think that had the warning 5 been different it would have been more 6 appropriate, but I don't know that he would 7 have recalled it at the time. 8 Q. So this case boils down to an 9 on-product warning? 10 A. The case boils down to the fact 11 that there was a design defect in the 12 motorcycle, and that instead of fixing it 13 through a design or providing an adequate 14 safeguard they provided an inadequate warning 15 in the manual. 16 Q. And the design defect was what? 17 A. The fact that the oil sight 18 glass can fail when the bike is left at a 19 standstill, which is a customary, foreseeable 20 use of the motorcycle. 21 Q. But you're relying on others to 22 determine that design defect? 23 A. Sure. I'm relying upon Mark 24 Yeldham and his testimony as to what the</p>

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<p>Page 121</p> <p>1 marked as Vigilante-4, which is the cover 2 sheet and two pages of the Rider's Manual that 3 you have the original of and I have the 4 original of. Do we have the same one? 5 A. Wait, you have a publication 6 date on that? 7 MR. LEVINE: The last page. 8 THE WITNESS: 10/2002? 9 MR. HEINOLD: Yes. 10 THE WITNESS: All right. 11 BY MR. HEINOLD: 12 Q. I didn't mark down the Bates 13 number. 14 A. It's BMW North America 1 15 through BMW North America 2, BMWNA55 and 16 BMWNA64. 17 Q. One is 55, I believe that is 18 Page 351, Section 3, Page 351? 19 A. That is -- I'm going to say 20 it's 51. 21 Q. Okay. Down in the lower 22 right-hand corner of that page, all right, 23 would you read that into the record? 24 A. Sure. You want me start from</p>	<p>1 and in a box? 2 A. It's not the traditional way to 3 do signal work, but I'm not going to argue 4 about it because it looks like the entire 5 manual is black and white, except for the 6 front page. So they apparently chose to do 7 everything in black and white. 8 MR. LEVINE: He does not opine, 9 I don't believe, or criticize the form and 10 substance of the in manual warning; am I 11 correct? 12 THE WITNESS: That's correct. 13 It wasn't relevant to my opinions. 14 MR. LEVINE: He will not be 15 testifying as such at trial. You can do what 16 you want. I just thought that I would clarify 17 that. 18 BY MR. HEINOLD: 19 Q. But is it -- you say it's 20 irrelevant. My only question is, is it 21 inadequate? 22 A. It is inadequate. 23 Q. Is adequate or inadequate? 24 A. It is inadequate the way it's</p>
<p>Page 122</p> <p>1 Risk of fire or the Warning? 2 Q. You can start with the 3 Warning. 4 A. Warning: Make sure -- 5 Q. There's a Warning in large 6 letters, all bold, all caps, right, with a 7 Warning placard? 8 A. Oh, Warning: Make sure that 9 whether riding or standing still or when the 10 motorcycle is parked no easily flammable 11 material (for example, hay, grass, leaves, 12 clothing or luggage, etc.) can come into 13 contact with the hot exhaust system. Do not 14 allow the engine to idle unnecessarily or for 15 prolonged periods - Risk of overheating or 16 fire. Ride away immediately after starting 17 the engine. 18 Q. Okay. Now, the word Warning is 19 large; correct? 20 A. It's larger than the print on 21 the page. 22 Q. Do you have a criticism with 23 the use of the Warning placard, the use of the 24 word Warning with all capitals and all bold</p>	<p>Page 124</p> <p>1 presented on that page. 2 Q. Why? 3 A. Well, first of all, the section 4 above it starts: Risk of fire, high 5 temperatures at the exhaust system, 6 particularly if the catalytic converter is 7 installed. 8 So obviously that's dealing 9 with a different fire cause scenario than the 10 oil sight glass failing. So I would think 11 that it's fairly self evident that the exhaust 12 gets hot and there's a potential for fire. 13 So now we have a warning 14 directly underneath that information that 15 deals with, again, stuff, combustibles coming 16 in contact with the hot exhaust system. A 17 person reading it would be expected to read 18 the Risk of fire section above it, get to the 19 warning and think that the whole thing, the 20 whole section was related the exhaust system 21 and the exhaust system being hot. 22 So they bury the information 23 related to not allowing it to idle 24 unnecessarily or for long periods within the</p>

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<p style="text-align: right;">Page 125</p> <p>1 section dealing with don't let hot stuff 2 contact hot exhaust. So that warning should 3 have been related to don't let it idle 4 unnecessarily for long periods, should have 5 been separated from the other information to 6 make it distinct and to let readers know that 7 it's a different topic, a different specific 8 topic.</p> <p>9 Second, Do not allow the engine 10 to idle unnecessarily or prolonged periods. 11 Neither of those terms, unnecessarily or 12 prolonged, are defined. I think Mark Yeldham 13 testified to that as well. We don't know what 14 unnecessarily or prolonged means and neither 15 does the reader.</p> <p>16 So, for example, Mr. Yazdani 17 testified that he was starting the bike 18 because he didn't winterize it. So obviously 19 it was necessary to him to start the bike 20 because he wasn't winterizing it. A prolonged 21 period is, again, open to interpretation.</p> <p>22 Some people's fires apparently 23 claim they're happening in 10 to 15 minutes. 24 Mr. Yazdani is not sure how long exactly he</p>	<p style="text-align: right;">Page 127</p> <p>1 reasons why this information on Page 51 of the 2 manual is inadequate. 3 Kind of a higher level issue is 4 that this atypical hazard associated with the 5 failure of the sight glass isn't communicated 6 to the rider or the reader until Page 51. 7 That means they've had 50 pages of other 8 information about the bike that doesn't 9 reference the fact that the oil sight glass 10 can fail and cause a fire if you let it idle 11 for periods of 10 to 15 minutes or longer. 12 And then I did forget to 13 mention too that it doesn't tell you why 14 there's a risk of fire for letting it idle, 15 that being the oil sight glass can fail or the 16 wire harness can ignite. So it would be nice 17 to know, typically in the manual, why they're 18 telling me why not to idle unnecessarily or 19 for a prolonged period of time.</p> <p>20 Q. Are you finished?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. Doesn't the phrase "ride 23 away immediately" help define not allowing the 24 engine to idle unnecessarily or prolonged</p>
<p style="text-align: right;">Page 126</p> <p>1 let the bike run, up to a half hour, maybe a 2 little bit longer. It could have been a 3 little bit less. So we don't know if he had 4 planned on leaving it run for 30 minutes 5 whether the fire would have started within 6 that period of time. If he planned on letting 7 it run for 15 minutes you don't know whether 8 the fire would have started in that time or 9 not. So, it's not specific, it's not explicit 10 and leaves open to interpretation as to what 11 is necessary, what is prolonged.</p> <p>12 And then we have: Ride away 13 immediately after starting engine. That's in 14 direct conflict with other instructions in the 15 manual that tell you have to put it in high 16 choke, hold the button in for some period of 17 time on a cold engine until the engine warms 18 up enough that you can release it so that the 19 bike doesn't stall.</p> <p>20 So that's apparently in direct 21 conflict, unless you expect the rider to be 22 holding the choke start or the choke button in 23 while riding down the street, which I don't 24 think BMW intended. So they're some of the</p>	<p style="text-align: right;">Page 128</p> <p>1 periods? 2 Is it your testimony that 3 there's no correlation there, there's no 4 assistance in helping the reader understand 5 what unnecessarily or for prolonged periods 6 mean?</p> <p>7 A. Well, two things. The question 8 is whether or not it's related to Do not allow 9 the engine to idle unnecessarily or for 10 prolonged periods, or is related to the 11 potential for combustible to contact the 12 exhaust. So we don't know based upon the way 13 it's formatted and presented.</p> <p>14 Second, the ride away 15 immediately after starting the engine is 16 contrary and conflicting with other 17 instructions, and the reality of starting this 18 bike on a cold day. That you can't ride away 19 immediately after starting the engine. You 20 have to go through a warm-up period. So 21 obviously it's in direct conflict with other 22 instructions in the book.</p> <p>23 Q. Where is the conflict for the 24 other instructions?</p>

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<p style="text-align: right;">Page 129</p> <p>1 A. Well, Mark Yeldham testified 2 that on cold days you have to hold the choke 3 in all the way for it to heat up. Otherwise, 4 the engine will stall if you release it. 5 So, again, if you have to hold 6 the choke in for a period of time on cold 7 engines to get it not to stall, you can't ride 8 away immediately. It means that you have to 9 let that bike warm up for some period of time. 10 Now, Mr. Yeldham also testified 11 that what that period of time is subjective to 12 the user. So if it's subjective to the user, 13 one rider may think that five seconds is okay, 14 another rider may think 10 minutes is 15 necessary. Again, that's the problem with not 16 being specific and explicit, you're allowing 17 the user to interpret subjective terms. 18 Q. You agree that -- what are you 19 looking at there? 20 A. Oh, this is my summary of Mark 21 Yeldham's testimony. 22 Q. That's also on your flash 23 drive? 24 A. Yes.</p>	<p>1 and how to avoid it and what can happen if 2 it's not avoided and why it occurs. 3 Q. For the reasons you stated? 4 A. Yes. 5 Q. How about on Page 60 of the 6 manual. I think it's Bates number 64 on 7 Yazdani Exhibit 1. 8 A. Page 60, right? 9 Q. Yes. Do you consider that 10 inadequate? 11 A. Yes. 12 Q. Why? 13 A. Again, first of all, it's on 14 Page 60 of the manual as opposed to being at 15 the start of the manual to alert and inform 16 someone before they read 59 pages of things 17 that are not related to this hazard. 18 Second, the risk of overheating 19 or fire is provided after telling them do not 20 warm up the engine with the motorcycle at a 21 standstill. It would have been more 22 appropriate to say, warning, fire hazard, and 23 then you can explain it, as opposed to giving 24 the consequence of fire as the very last part</p>
<p style="text-align: right;">Page 130</p> <p>1 Q. Would you agree that Mr. 2 Yazdani said when he read it that he 3 understood it? 4 A. In his deposition that's what 5 he testified to. 6 Q. Yes. And that he understood 7 that he should not leave it at idle at a 8 standstill? 9 A. After the fact he certainly did 10 read it and understand it, but he also 11 testified that until the deposition he wasn't 12 aware of why this thing caught fire, which 13 means he didn't understand what he did and how 14 it correlated with the fire. So after the 15 fact in his deposition reading the manual he's 16 testified that he understood it. 17 Q. So it's your testimony that 18 this manual is not clear about one, don't 19 leave it at idle at a standstill because it 20 may catch on fire, is that your testimony? 21 A. My testimony is it's an 22 inadequate warning. The information provided 23 on Page 51 of the Manual is inadequate to 24 alert and inform a rider as to the fire risk</p>	<p>1 of that sentence. 2 The next sentence says: Ride 3 away immediately after starting the engine, 4 which is consistent with the other page. 5 However, directly under that it says: To 6 avoid overheating the air-cooled engine and 7 possible damage as a result, avoid even short 8 warm-up periods at a standstill. However, it 9 says, period, avoid high engine speeds after a 10 cold start. 11 So, again, it's inconsistent. 12 You have to have high-engine speeds after a 13 cold start because you're supposed to hold the 14 choke in. The choke in is associated with 15 high-engine speeds. Again, if you have to 16 hold the choke in until the engine warms up so 17 it doesn't stall out you can't ride away 18 immediately. So there's a conflict. 19 Also, it doesn't tell you that 20 the oil sight glass can fail and spread or 21 allow hot oil to escape and create a fire. So 22 someone may read that and think that if it's a 23 fire it's because combustible materials are 24 near the exhaust. That's probably why they</p>

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<p style="text-align: right;">Page 133</p> <p>1 want me setting this bike -- letting it stand 2 still for a while. If I don't have any 3 combustibles it's not really an issue. 4 Q. Are you finished? 5 A. I think so. 6 Q. So is it your testimony that if 7 someone reads this sentence: Do not warm up 8 the engine with the motorcycle at a 9 standstill, the risk of overheating or fire, 10 with an exclamation point, that they are not 11 going to understand that they should not warm 12 up the motorcycle and engine at a standstill, 13 is that your testimony? 14 A. I think that if they read the 15 entire sentence they would understand that's 16 what the sentence had told them. But 17 again -- 18 Q. They would understand what not 19 to do; correct? 20 A. But they would understand -- 21 Q. Correct? 22 A. It's in conflict with other 23 parts of the manual and the testimony of Mark 24 Yeldham, that they can't follow it.</p>	<p style="text-align: right;">Page 135</p> <p>1 Q. So someone who is going to own 2 and operate a motorcycle they read the 3 statement: Do not warm up the engine with 4 motorcycle at a standstill, risk of 5 overheating or fire, exclamation point, is not 6 going to understand don't leave this idling at 7 a standstill or it might catch on fire, is 8 that your testimony? 9 A. No. My testimony is that it's 10 in conflict with other information in the 11 manual, but it's also, this is important too, 12 for the purchaser of a new bike, it's 13 inconsistent and in conflict with the training 14 that the BMW North America dealership is 15 providing him on how to operate the bike. 16 So you've got a statement in 17 the manual that's in direct contrast, conflict 18 with other parts in the manual, their own 19 prior experiences if they've ridden and used 20 motorcycles before, and the training that BMW 21 provided them if they purchased it new from 22 the dealership. 23 Q. What is that training? 24 A. According to Mark Yeldham</p>
<p style="text-align: right;">Page 134</p> <p>1 Q. The conflict with other parts 2 of the manual meaning the use of the choke? 3 A. It tells you start the engine, 4 but hold the choke in until the engine smooths 5 out, go to low choke, and then you can go. 6 Mark Yeldham testified that if 7 you come up high choke too soon the engine 8 will stall. He testified that you have to 9 hold the choke in its high position until the 10 engine smooths out, and that smooth-out 11 process is subjective or the smooth-out point 12 is subjective. 13 Q. Okay. So that someone who is 14 operating a motorcycle, can we -- let me step 15 back. 16 Can we assume that someone who 17 is going to operate a motorcycle has a basic 18 understanding of how to operate it? 19 A. As you mean -- excuse me, do 20 you mean how to start it and ride it, I'm sure 21 they do, unless it's an unfamiliar bike that 22 maybe they're borrowing a friend's or what 23 have you, then may need someone to show them 24 how to start it.</p>	<p style="text-align: right;">Page 136</p> <p>1 they're trained to show them how to start the 2 bike by holding in the choke until the engine 3 smooths out and then dropping it down to the 4 detent position of the choke switch. 5 Q. Are there any parameters on how 6 long that takes in a motorcycle like this? 7 A. Well, that's part of what Mr. 8 Yeldham testified to. It's subjective and 9 it's depended upon the ambient temperature and 10 the temperature of the engine. So it may take 11 a shorter amount of time if the machine is 12 warm or if the temperature is warmer. It may 13 take a longer time. It's also subjective to 14 the user. And either you let it go long 15 enough, whatever that time may be because it 16 is very variable, or you come off too soon, 17 and if you come off too soon the engine can 18 stall. 19 Q. Are there any parameters on 20 that time? 21 A. Mark Yeldham testified it was 22 subjective. 23 Q. Subjective. Are there any 24 parameters in your mind?</p>

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<p style="text-align: right;">Page 137</p> <p>1 A. I'm relying upon Mark Yeldham. 2 He should know the bike better than me. 3 Q. So could someone have to hold 4 the choke in for two hours? 5 A. I doubt it. 6 Q. Okay. So there has to be some 7 parameter? 8 A. But it could be in warm 9 weather. It could be a warm engine. It might 10 be 10 seconds. It could be a couple minutes. 11 If it's cold weather, cold engine. 12 Now, my Harley-Davidson 13 Sportster had a manual choke. It wasn't on 14 the handlebar. It was a switch underneath 15 the -- or on the side of the engine, I 16 believe, and it would have to stay warmed up 17 for several minutes. In five or 10 minutes if 18 I was taking that bike out in January, which I 19 did often, even when I was a younger rider, to 20 get it to get into the mid point of the choke 21 before I could ride off, otherwise it would 22 stall. It took minutes, 10 minutes, 15 23 minutes to warm up at high choke. 24 It wasn't -- I don't know what</p>	<p style="text-align: right;">Page 139</p> <p>1 and it leaves room for interpretation, which 2 is subjective, which leads to all different 3 kinds of conclusions. Some of them may be 4 right, but some of them are going to be 5 wrong. 6 And that's the problem, warnings aren't supposed to be subjective. 7 They're not supposed to leave open for 8 interpretation. They're supposed to be 9 specific, explicit and they're supposed to be 10 consistent with other information and 11 experiences. If they're not, it leaves people 12 to question the warning and then come up with 13 their own subjective idea of what the warning 14 is supposed to mean and what they're supposed to 15 do. And some people will get it right and 16 some people will get it wrong. And that's not 17 the definition of an adequate warning. 18 Q. Okay. So it's your opinion if 19 someone reads, Do not warm up the engine with 20 the motorcycle at a standstill - Risk of 21 overheating or fire, is going to say it's okay 22 for me to leave this warming up at a 23 standstill for 30 minutes or more? Is that</p>
<p style="text-align: right;">Page 138</p> <p>1 the BMW is. According to Mr. Yeldham it's 2 subjective. But I do know with other bikes 3 that it could take a number of minutes, a 4 period of time for it to warm up. 5 Q. So the basis of your opinion is 6 that the operator of an motorcycle would not 7 be able to tell the difference between the 8 time you have to leave the choke on until it 9 smoothed out and not leaving the motorcycle 10 engine running at a standstill because it 11 might catch on fire? 12 A. Exactly. You're telling him 13 two different things. 14 Q. And the motorcycle rider can't 15 tell the difference between those two things? 16 A. I think he would look at it and 17 say what the heck is this trying to say, 18 because it's inconsistent with my experience, 19 my past experience, and it's inconsistent with 20 the training BMW gave me, and it's 21 inconsistent with other parts of the manual. 22 So is this some type maybe translation error 23 from German. I don't know what the rider is 24 going to think, but it's certainly not clear</p>	<p style="text-align: right;">Page 140</p> <p>1 your opinion? 2 A. I doubt that they will read 3 that and say that allowing it to warm up for 4 30 minutes or more is appropriate. 5 Q. Okay. How about 20 minutes or 6 more, would they say that? 7 A. Probably not 20 minutes. 8 Q. How about five minutes? 9 A. That's where it gets 10 questionable because then some bikes -- some 11 temperatures it's going to take five minutes 12 of warming up on high choke for that engine to 13 smooth out. 14 Q. So do you disregard for your 15 opinions in this case the fact that Mr. 16 Yazdani read the warning and said I understood 17 it, I understood the communication to me what 18 not to do and the consequence of it and I just 19 don't remember reading it? 20 A. Well, I think he testified that 21 reading it in the deposition he understands. 22 That's reading it in the deposition after a 23 fire occurred, after being told what happened 24 he understands what the manual means.</p>

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<p>Page 141</p> <p>1 He testified that he's not sure 2 if he read that part of the manual or if he 3 read it, if he understood it at the time he 4 read it, or if he read it and either 5 understood it or didn't understand it, but he 6 didn't remember it. 7 So asking him after the fact, 8 the Monday morning quarterback, what that 9 statement means is not fair and is not the 10 right way or a valid way to assess the 11 adequacy of that warning. 12 Q. Do you believe -- you said that 13 he didn't know whether he would have 14 understood it if he read it back before the 15 fire? 16 A. That's what he testified to. 17 Q. And that's important to your 18 opinion? 19 A. What's important to my opinion 20 is that the warning wasn't on the bike to 21 alert and inform the rider of the unique fire 22 hazard associated with the design of this 23 bike. 24 Q. Is it important to your opinion</p>	<p>Page 143</p> <p>1 It's my opinion had he read the 2 manual that it wouldn't have been adequate to 3 inform him of the fire hazard at the time he 4 first owned the bike. Therefore, even if he 5 had read it and understood -- if he had read 6 it he wouldn't have understood what BMW was 7 trying or claiming that the warning is 8 intended to address and intended to say. It 9 would be my opinion that he wouldn't have 10 understood it at that time. 11 MR. HEINOLD: Can you read the 12 question back and can you answer it this time. 13 - - - 14 (Whereupon, the court reporter read 15 back the pertinent information.) 16 - - - 17 THE WITNESS: It's the same 18 answer. 19 MR. LEVINE: Do you feel he's 20 not answering your question? 21 MR. HEINOLD: Yes. 22 MR. LEVINE: I heard the 23 question, I heard the answer. Let me break it 24 down and see if I understand. You've asked</p>
<p>Page 142</p> <p>1 that you believe Mr. Yazdani would not -- 2 might not have understood the warning if he 3 read it back before the fire? 4 A. It would be important to my 5 opinion if Mr. Yazdani testified that he read 6 it in the Manual, he fully understood it, 7 could explain it and was thinking about it at 8 the time of the fire and did it anyway. That 9 would certainly be important to my opinion. 10 MR. HEINOLD: Can your read 11 back my question and please answer my 12 question. 13 - - - 14 (Whereupon, the court reporter read 15 back the pertinent information.) 16 - - - 17 THE WITNESS: It's my opinion 18 that Mr. Yazdani did not appreciate the fire 19 hazard associated with his actions, whether 20 it's because he didn't read the manual or read 21 it and didn't understand it, or read it, 22 didn't understand it or understood it and 23 forgot it. He wasn't aware of it at the time 24 of the fire.</p>	<p>Page 144</p> <p>1 him, is it your opinion that it would not have 2 mattered? 3 MR. HEINOLD: No. I asked 4 him -- he said he wouldn't have understood it 5 and that he testified -- strike that. I'll 6 start over. 7 He said that Mr. Yazdani 8 testified that he wouldn't have understood it 9 back then or might not have understood it back 10 then. And I said: Is it important to your 11 opinion that he wouldn't have understood it? 12 That's a simple question. 13 MR. LEVINE: First off, is it 14 accurate that the witness here, Dr. Vigilante, 15 stated that he did not understand it, would 16 not have understood it, might have not 17 understood it, because you threw those in a 18 little bit softly there? 19 In other words -- 20 MR. HEINOLD: I didn't throw 21 them in. 22 MR. LEVINE: Bear with me, I'm 23 going to get you your answer that you're 24 looking for, I promise you. You put that</p>

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<p style="text-align: right;">Page 145</p> <p>1 supposition in in the beginning of your 2 question: Based upon the fact that you have 3 testified Mr. Yazdani might have not have 4 understood, did not understand it or would not 5 have understood it. 6 MR. HEINOLD: I didn't ask the 7 question that way, Ken. 8 MR. LEVINE: I'm going to help 9 you here. I'm promising you. Maybe I need to 10 hear it again. I apologize. 11 MR. HEINOLD: Go ahead, ask 12 whatever you want to do. 13 MR. LEVINE: No. I was asking 14 her what your question was because I don't 15 want to change your question. 16 MR. HEINOLD: I'll start over. 17 MR. LEVINE: I promise you I'm 18 not going to let him avoid you. 19 BY MR. HEINOLD: 20 Q. Do you believe Mr. Yazdani said 21 that he would not have understood that warning 22 if he had read it back before the fire? 23 A. What I testified to, and I'll 24 read my summary of his testimony, he read the</p>	<p style="text-align: right;">Page 147</p> <p>1 should I abide by it or comply with it. 2 Q. Okay. When you testified 3 earlier you said he testified he didn't 4 understand it, he didn't know if he understood 5 it. You just read that and you used the word 6 registered and transformed registered into 7 lack of understanding rather than perhaps it 8 didn't sink in, perhaps he forgot rather than 9 understand. We've been sitting here talking 10 about whether this is understandable or not. 11 I want to know -- after that 12 description of why I'm asking you this 13 question, I want to know this: Is it 14 important to your opinion that he did not 15 understand it prior to the accident if he read 16 it? 17 A. Again, my understanding is he 18 testified he was not aware of the fire hazard 19 prior to the incident. He testified he 20 doesn't recall whether he read the manual -- 21 excuse me, that part of the manual, if he read 22 it, if it didn't register -- 23 MR. LEVINE: I'm going to 24 interrupt. You don't need to keep repeating</p>
<p style="text-align: right;">Page 146</p> <p>1 manual, but he does not recall if he read the 2 manual, if he -- excuse me, I'll start over. 3 He read the manual, but he does 4 not recall if he read the warning and didn't 5 register it or if he did not read the 6 warning. So his testimony is he doesn't know 7 if he read it, and if he read it, it didn't 8 register to him. So that's my understanding. 9 So there's no testimony, 10 there's no evidence to state that he either 11 read it and that if he read it, he understood 12 it in the manner in which BMW North America is 13 claiming they intended it to mean. 14 So it's possible, it certainly 15 is possible that Mr. Yazdani read that 16 language or part of that language and took it 17 to understand the same thing that other people 18 would understand by reading the entire 19 manual. And based upon prior experiences, 20 that it's not consistent with the way you're 21 supposed to use the bike, and that it's in 22 conflict with the way you're supposed to use 23 the bike. And if it's in conflict, how valid 24 is the statement. And if it's not valid, why</p>	<p style="text-align: right;">Page 148</p> <p>1 what Mr. Yazdani did or didn't testify to. I 2 appreciate that's part of your answer, but I 3 sit here and listen to you repeating 4 exactly -- we have read it. We've seen it, 5 Bill. The question was entirely different. 6 So he's asking you whether or 7 not his opinion as expressed there, and 8 correct me if I'm wrong, are important or 9 unimportant to your opinions here? But if you 10 want to correct me, go ahead. 11 THE WITNESS: Yeah, it's not 12 important to my opinion if -- I don't want 13 to -- I'm not going to sit here and say that 14 Mr. Yazdani read that manual and understood it 15 the way BMW is intending it to mean at this 16 point in time. So, that's number one, I'm not 17 going to say that I agree with that. 18 So based upon -- what I read 19 through his deposition, I don't think that's 20 correct that he understood the message that 21 BMW was intending to convey. But if he did, 22 understood that line when he read that manual 23 when he first got the bike, it didn't sink in, 24 it didn't register, he wasn't aware of it and</p>

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<p style="text-align: right;">Page 149</p> <p>1 he sure wasn't thinking about it or aware of 2 it at the time of the incident. 3 And that's because A, the 4 manual is inadequate and the information in 5 the manual is inadequate. And B, providing 6 the information only in the manual is 7 inadequate and inappropriate. 8 I'm starting to get a little 9 big tongue-tied because I'm starving. So it 10 might help if I eat, take a break. 11 MR. HEINOLD: Let's take a 12 break. 13 - - - 14 (Whereupon, a short break was taken at 15 this time.) 16 - - - 17 BY MR. HEINOLD: 18 Q. Do you believe the owner of a 19 motorcycle has the responsibility to 20 understand the motorcycle and its features in 21 order to own and operate it safely? 22 A. To a reasonable degree, sure. 23 Q. Okay. How to operate it? 24 A. Sure.</p>	<p style="text-align: right;">Page 151</p> <p>1 for the vehicle as opposed to understanding 2 all of its nooks and crannies. 3 Q. Are there parts that it's okay 4 to skip? 5 A. Sure. 6 Q. What parts are those? 7 A. Things that you're not 8 interested in or that you think you may have 9 already known. I think these are reasonable 10 things that people do quite often. 11 Q. When it says "Warning, Risk of 12 fire", is that okay to skip? 13 A. It depends on where it's 14 presented, how it's presented. 15 Q. Well, I mean, let me be clear. 16 Is it okay not to read it? Do you justify the 17 decision that an owner -- that a manual -- 18 that an owner would look at the Rider's Manual 19 and see it said Warning, and then doesn't read 20 what the warning is? Do you justify that? 21 A. Again, it depends upon how it's 22 presented, where it's presented, why it's 23 presented and what other information it's 24 presented with.</p>
<p style="text-align: right;">Page 150</p> <p>1 Q. Its features and 2 characteristics? 3 A. To a reasonable degree. 4 Q. How to maintain it, service it? 5 A. To a reasonable degree. 6 Q. What the safety features are? 7 A. To a reasonable degree. 8 Q. Do you believe the owner of a 9 motorcycle has the responsibility to read the 10 Owner's Manual? 11 A. I don't believe they have the 12 responsibility to study an Owner's Manual. 13 They should read the manual, but I don't think 14 they have the responsibility to study it. 15 Q. What's the difference between 16 reading and studying in your mind? 17 A. The ability to extract every 18 piece of information the manufacturer provides 19 in the manual would be under the definition of 20 studying as opposed to reading it in a 21 leisurely fashion where you are collecting the 22 information that you're interested in and 23 perhaps skipping parts that you're not 24 interested in, and generally getting a feel</p>	<p style="text-align: right;">Page 152</p> <p>1 Q. I'm not talking about not 2 noticing it. Let's be clear on my question. 3 Let's say there's a warning and 4 it says Warning, are you saying it's okay for 5 that person not to read what's under that 6 Warning? I'm talking about reading. 7 A. Again, it depends upon the 8 information that it's presented with, how it's 9 presented, where it's presented, why it's 10 presented. 11 So, for example, if there's a 12 picture of a helmet and it says Warning, 13 somebody is going to infer that's probably 14 going to say, Warning, don't ride a motorcycle 15 without a helmet. So there's a good chance 16 people are going to skip it. 17 Q. Is that okay? 18 A. Absolutely. They already have 19 the information or believe they have the 20 information. So the question is, again, how 21 you're presenting the information to make sure 22 that if it's important, if it's urgent, that 23 it's set off and it's identified as such. 24 Making the warning the same as</p>

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<p>1 all the other warnings on the page, by the 2 time I read all the other warnings I'm like 3 this is ridiculous, I don't need to know this, 4 or this isn't relevant, or I already knew 5 this, why should I read the fifth warning on 6 the page. That's a reasonable reaction of a 7 person.</p> <p>8 So if it's unique and specific 9 to this bike it needs to have greater 10 prominence in the book and where it's 11 presented, not on Page 51, at the front of the 12 manual, and how it's presented. Not the same 13 type of signal word as the other four warnings 14 that are on the page that may or may not be 15 relevant to the information I need as a 16 rider.</p> <p>17 So it just depends on how it's 18 presented, where it's presented, why it's 19 presented and what other information it's 20 presented with.</p> <p>21 So here's a good example, on 22 Page 49: Warning, do not read -- excuse me, 23 do not ride the motorcycle after drinking 24 alcoholic beverages. I'm done reading. As a</p>	<p>1 anything combustible get near my exhaust 2 because it gets hot. Do I need to read the 3 rest of that to understand, no. 4 So that's the problem with the 5 way this particular warning is presented, 6 because it's in the information that's readily 7 observable, readily known. So there's no 8 reason for the user to continue reading down 9 to that third sentence that says: Oh, by the 10 way, do not allow the engine to idle 11 unnecessarily or for prolonged periods. 12 Q. So we're clear, it's okay with 13 you if the owner of a motorcycle doesn't read 14 the warning on Page 51 that we're talking 15 about, yes or no? 16 I'm not asking for reasons why 17 someone might not. I'm asking you, a warning 18 experts, is it okay -- are you saying yes, 19 it's okay, you don't have to read that? 20 A. It is foreseeable and 21 reasonable for a person not to read an 22 inadequately presented warning. So the fact 23 that it's inadequate on Page 51, 53 would be 24 reasonable for a person not to read it.</p>
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<p style="text-align: right;">Page 157</p> <p>1 Instruction Manual to mitigate the design 2 defect with the motorcycle, it's inappropriate 3 and it leads to long manuals. 4 So if they had fixed it from 5 the beginning or provided an adequate 6 safeguard, there wouldn't be a need to add it 7 to the manual, maybe cut a page-and-a-half out 8 of it. 9 Q. So human factors experts have 10 no role in the length of the modern day 11 manual? 12 A. Maybe litigation attorneys. 13 Human factors experts would say fix the 14 design, provide the safeguard, do not rely 15 upon a warning. Particularly they would say 16 do not rely upon a warning in a manual. 17 As a human factors professional 18 my preference is to fix the design. When I 19 worked for the IBM Corporation I worked with 20 the engineers to fix the design before we 21 relied upon a warning in a manual around the 22 product. Eliminating it through design is 23 always the first and best option. Providing a 24 guard is the second and second best option.</p>	<p style="text-align: right;">Page 159</p> <p>1 riders. So it means everybody is wrong, or 2 does it mean BMW is wrong for depending upon a 3 warning on Page 60 of their manual to fix a 4 design defect. 5 Q. What's the point of a manual 6 then? 7 A. The point of a manual is to say 8 here are the features of the bike, if you need 9 to know them because it's not apparent in the 10 way the bike is presented then read the 11 manual. 12 From a human factors 13 standpoint, again, you make products easy to 14 use, intuitive to use. If you make them easy 15 to use and intuitive to use and you design out 16 the hazards to provide adequate safeguard the 17 need for a manual becomes less and less and 18 less. The goal of the human factors engineers 19 is to make manuals as short as possible by 20 making the design intuitive and easy to use as 21 possible. 22 Q. Do you have a list that you use 23 when you advise clients or make 24 recommendations to tell the owner of a product</p>
<p style="text-align: right;">Page 158</p> <p>1 Relying upon a manual means you've already 2 given up on your design, and that to me is 3 inappropriate. 4 Q. Go back to Page 60. 5 A. Sure. 6 Q. You criticized this warning 7 because it was on Page 60. My question is: 8 Are you saying it's okay for the owner of this 9 type of motorcycle not to read that warning, 10 not to gain the information that it provides? 11 Yes or no? 12 A. There's plenty of reasons why 13 it would okay for the owner of a motorcycle 14 not to read this part of the manual. And it 15 was foreseeable to BMW that a rider wouldn't 16 read this part of the manual, and if they 17 didn't read this part of the manual they would 18 have gotten the information presented. 19 Q. So if Mr. Yazdani didn't read 20 this manual, read this part of the manual on 21 Page 60, you're saying that's okay, good job, 22 Mr. Yazdani, good job? 23 A. I would say his behavior is 24 consistent with the majority of consumers and</p>	<p style="text-align: right;">Page 160</p> <p>1 what warnings he should or shouldn't read in 2 the manual, which ones are okay not to read? 3 A. Nope. 4 Q. Are there some warnings that 5 are okay not to read? Just forget about why 6 they might not, are there warnings that are 7 okay not to read? 8 A. Again, it's my opinion that a 9 reasonable rider, a reasonable person would be 10 reasonable in not reading an inadequate 11 warning or inadequate information that's 12 presented in an inadequate fashion. 13 Q. Tell me which warnings are okay 14 not to read. 15 A. Well -- 16 Q. You just bought a motorcycle. 17 Which warnings are okay not to read? 18 A. If I bought a motorcycle and I 19 went through my rider training with BMW -- 20 Q. I'm not asking that, sir. And 21 we can go around and around, and I can do the 22 same thing we've done and I'll ask them over 23 and over again. You've got your speech, I get 24 it. I'd like you to answer my question.</p>

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<p style="text-align: right;">Page 161</p> <p>1 Are there warnings that are 2 okay not to read, yes or no? 3 A. So as I was saying -- 4 Q. I'll tell you what, answer me 5 yes or no and then give whatever explanation 6 you want. 7 MR. LEVINE: I'm going to 8 object to this question, because if you were 9 to hear your own question, you're saying -- 10 you haven't self defined it yourself, are 11 there warnings okay not to read? 12 MR. HEINOLD: I don't need any 13 more definition. Are you objecting to the 14 form? 15 MR. LEVINE: I'm objecting to 16 the form because you can have 17 different 17 meanings. So when he answers it you're not 18 even going to know what -- 19 MR. HEINOLD: 17 different 20 meanings to what? 21 MR. LEVINE: It could have been 22 warnings that are in a product, warnings that 23 are in a manual. 24 MR. HEINOLD: I said in a</p>	<p style="text-align: right;">Page 163</p> <p>1 manual? When someone buys this bike, do they 2 get you too and say hey, do I have to read 3 this warning? 4 My question is: Somebody buys 5 a product, they get the manual. Are there 6 warnings that they don't have to read? 7 You just said yes, there are 8 warnings. So now I want to which ones they 9 are. How do you determine which ones they 10 are? How does he determine which ones they 11 are? 12 A. As I was trying to explain 13 generally, if it's an inadequate warning it's 14 okay not to read it because that's what you 15 would reasonably expect from a reasonable 16 person. 17 There are other reasons why you 18 wouldn't read a warning. So, for example, 19 maybe there's a section of the manual that 20 doesn't apply to your bike or your product, 21 this bike is for. This bike is for R 1150s 22 and R 850s. It may be a warning that's 23 presented in part of the manual that something 24 you're not going to deal with.</p>
<p style="text-align: right;">Page 162</p> <p>1 manual. I'll start over. 2 MR. LEVINE: In this manual. 3 BY MR. HEINOLD: 4 Q. You just bought this 5 motorcycle, are there warnings that are okay 6 not to read? 7 A. I think, again, my opinion is 8 it's -- 9 Q. Can you answer me yes or no? 10 Can we get that? Answer me yes or no and -- 11 MR. LEVINE: I would ask that 12 the witness answer the question and then 13 explain his answer. 14 THE WITNESS: Yes, it's okay 15 not to read inadequate warnings. 16 BY MR. HEINOLD: 17 Q. How does the reader know that 18 they're inadequate if he hasn't read it? 19 A. I think that it would be up to 20 me to decide whether it's inadequate or not 21 and it would be consistent with the person's 22 behavior as to whether they read it or not as 23 to whether it was inadequate or not. 24 Q. But do you come with the</p>	<p style="text-align: right;">Page 164</p> <p>1 So, for example, there's a 2 headlight basic setting in here. Maybe I'm 3 not planning on setting my own headlights. 4 I'll let the garage and the mechanic do that. 5 So why am I going to read it. 6 You know, there's different 7 features of the bike that I may not be 8 interested in, don't planning on using them. 9 Therefore, the warning wouldn't be relevant to 10 me and that would be okay not to read it. 11 There are plenty reasons of why it would be 12 okay not to read a warning. 13 Q. Okay. I just bought a bike, I 14 want you to assume that. 15 A. Okay. 16 Q. I picked up this manual. Is it 17 okay for me not to read the warning on Page 60 18 that says: Warning, do not warm up the engine 19 with the motorcycle at a standstill - Risk of 20 overheating and fire? Is it okay for me not 21 to read that? 22 A. I think it would be foreseeable 23 that somebody would not read it, and it 24 wouldn't be okay because they're not getting</p>

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<p style="text-align: right;">Page 165</p> <p>1 important safety information, but it's not 2 their fault that they're not reading it. 3 Q. If I came to you and said hey, 4 Bill, I just bought a manual, should I read 5 it, what would you tell me? Yes or no? 6 A. I would think as a manufacturer 7 I would say I'm providing -- 8 Q. That wasn't my question. I'm 9 your neighbor, Bill. Hey, Bill, I just bought 10 this, should I read this manual or not, yes or 11 no? 12 A. Yes, I would say if you find it 13 interesting go ahead and read it. If you 14 think you can ride a bike without it then 15 don't read it. 16 Q. On Page 10 -- I'm sorry, Page 17 12 of your report at the bottom flowing over 18 onto Page 13, you list 10 items that should 19 have been included in this manual regarding 20 the fire as I -- I'm sorry, the risk of fire; 21 is that correct? 22 A. I don't know what you're asking 23 me. 24 Q. Look at Page 12.</p>	<p style="text-align: right;">Page 167</p> <p>1 would have to know 1 through 10. 2 So without adequate warning you 3 would have to hope that the rider knows 1 4 through 10. As the next paragraph states, 5 most people are not going to know or have 6 information all of 1 through 10, therefore, 7 they're not going to appreciate the fire 8 hazard associated with the design defect 9 without adequate warning. 10 Q. So this doesn't have to be in 11 the manual? 12 A. I never said it had to be in 13 the manual. 14 Q. Well, that's the way I read it. 15 That's why I'm here. That's why I get to ask 16 you questions, to clarify. It's a great 17 system. 18 So what is the point of these 19 10 things? What is it you're telling us 20 should be done with this information? How is 21 it imparted to the rider? 22 A. Well, I don't know that it's 23 necessarily to impart all of it to the rider. 24 What I'm simply saying is that if you're not</p>
<p style="text-align: right;">Page 166</p> <p>1 A. Yes. 2 Q. Do you see at the bottom Item 1 3 through 9? 4 A. Yes. 5 Q. Please turn to Page 13. 6 A. Okay. 7 Q. Do you see the top, Item 10? 8 A. Yes. 9 Q. What are those? 10 A. As it states in there, it's 10 11 things that a person would need to understand 12 to foresee a potential fire hazard associated 13 with warming up the engine with motorcycle at 14 a standstill without adequate warning. 15 Q. So is it your testimony that 16 these 10 things need to be in the manual? 17 A. No. 18 Q. What's the purpose of these 10 19 things? 20 A. Well, I think it's pretty 21 explicit in the paragraph: To foresee the 22 potential fire hazard associated with warming 23 up the engine with the motorcycle at a 24 standstill without adequate warning the rider</p>	<p style="text-align: right;">Page 168</p> <p>1 going to provide adequate warning and if you 2 want the rider to appreciate the hazard, they 3 would need to know all of these 10 things. 4 And it's very unlikely that a rider would know 5 all of these 10 things, and therefore, they 6 wouldn't be aware or appreciate the hazard. 7 Q. So what is the adequate 8 warning? 9 A. I give the adequate warning on 10 Page 14 of the report. 11 Q. And that's the placard at the 12 bottom? Is that the sticker for an on-product 13 warning? 14 A. That is the example on-product 15 warning that I suggest should have been on the 16 motorcycle. 17 Q. Okay. What should have been in 18 the manual? 19 A. As I state on the top of Page 20 15, the warning itself should have been 21 repeated in the manual along with the 22 explanation of how the fire occurs. For 23 example, oil temperature increases to an 24 elevated level causing the oil sight glass to</p>

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<p style="text-align: right;">Page 169</p> <p>1 fail and allow hot oil to escape the engine or 2 heat from the exhaust headers can ignite the 3 body work or wiring harness. 4 Q. Is that the language that you 5 are proposing should have been in the manual? 6 A. Sure. 7 Q. And is it just that where -- I 8 mean, I want to know precisely what it looks 9 like. 10 A. Well, I give you precisely what 11 the warning looks like on the illustration -- 12 Q. That's the on-product. It's 13 the same thing? 14 A. I said it should be repeated in 15 the manual. 16 Q. So that should be repeated in 17 the manual and then what? How do you add this 18 e.g.? 19 A. You can put it right under it. 20 Q. And that's the language you 21 would use? 22 A. Sure. 23 Q. Now I understand. Why is it 24 important to have something different in the</p>	<p style="text-align: right;">Page 171</p> <p>1 adequate safeguard, such as the fan, what have 2 you, like Mike Zazula talked about. 3 If they weren't going to do 4 that, the least they could have done is put 5 the warning in Illustration 1 on Page 14 of my 6 report on the motorcycle itself and then 7 repeated the warning in the manual. 8 Q. Is it sufficient if that 9 warning is simply repeated without further 10 explanation? 11 A. I think it would be best 12 practice to include the further information. 13 Q. Is it sufficient, just the 14 warning? 15 A. I think it's sufficient with 16 just the warning on the product. 17 Q. Is it sufficient with just the 18 warning in the manual? 19 A. No. It needs to be on the 20 product. 21 Q. Let's assume the warning is on 22 the product, is it sufficient to have that 23 same warning in the manual without more? 24 A. I think you could put it in the</p>
<p style="text-align: right;">Page 170</p> <p>1 manual than on the product? 2 A. I didn't say it was. 3 Q. All right. 4 MR. LEVINE: He said he didn't 5 say that. 6 MR. HEINOLD: I'm starting a 7 new question. My question, as I recall, why 8 is it important to have it more in the manual, 9 and he said it's not. 10 THE WITNESS: No. I said I 11 didn't say that. You said that. I didn't say 12 that. 13 BY MR. HEINOLD: 14 Q. Is it important to have more in 15 the manual? 16 A. I don't know that it is, but 17 certainly you can. 18 Q. Let's be really clear then. 19 What is it that needs to be on this motorcycle 20 in order to make it safe for its intended use? 21 A. They need to fix the design 22 defect, make it safe for its intended use. If 23 they weren't going to provide or eliminate the 24 hazard for design they need to provide an</p>	<p style="text-align: right;">Page 172</p> <p>1 manual and you can add the information as best 2 practice or you can leave it off. I don't 3 think it's going to make that big of a 4 difference. 5 Q. So it's sufficient not to add 6 the additional information that's at the top 7 of Page 15? 8 A. All right. I think -- it's 9 given the placement in the manual you should 10 provide the information at the top of Page 15 11 in the manual. I think it provides additional 12 information for the user to understand what 13 the issue is, what the hazard is and why it's 14 occurring, increasing their understanding of 15 the event and increasing the propensity to 16 follow the warning. 17 Q. So the understanding of the 18 event is not sufficient in a manual if you 19 just put the warning illustration, repeat that 20 in the manual? 21 A. I'm not sure what you're asking 22 me. 23 Q. I'm having trouble 24 understanding what you're telling me. I</p>

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<p style="text-align: right;">Page 173</p> <p>1 really don't mean to be repetitive, but the 2 warning that's an illustration on Page 14 3 should be on the motorcycle? 4 A. I'm sorry, my opinion is that 5 the warning that's on Page 14, and it's under 6 Illustration 1, is an example of on-product 7 warning, meaning the ANSI Z535.4 2002 criteria 8 for on-product safety warnings, BMW North 9 America should have presented on the bike. 10 Q. Okay. And that is sufficient. 11 They don't need to put on the bike an 12 explanation about the oil temperature 13 increases elevated level causing the oil sight 14 glass to fail; correct? 15 A. They don't need to put that 16 information on the bike. 17 Q. Okay. Now I want to talk about 18 the manual. I want to assume this warning is 19 on the bike, okay? 20 A. Okay. 21 Q. If we put that placard, that 22 warning label that you have just said is 23 satisfactory to put on the product, if there 24 is -- if that is all that is in the manual on</p>	<p style="text-align: right;">Page 175</p> <p>1 words, and you may not have understood the 2 question, he said if the warning is on the 3 bike and the warning is in the manual, do you 4 also require, correct me if I'm wrong, that 5 the explanation following the warning is also 6 in the manual? I think that was your 7 question. 8 MR. HEINOLD: Yes. 9 THE WITNESS: I would say yes 10 because there's no reason not to put it. 11 BY MR. HEINOLD: 12 Q. In your report you criticize 13 BMW NA because -- you talk about you can't 14 rely on second purchasers getting the manual; 15 correct? 16 A. Okay. I think it's a true 17 statement. 18 Q. But is that relevant to this 19 case? 20 A. What do you mean? 21 Q. Because Mr. Yazdani got the 22 manual and he received that? 23 A. Yeah, it's not really relevant 24 to what Mr. Yazdani did with respect to</p>
<p style="text-align: right;">Page 174</p> <p>1 the top, is that sufficient for the manual, or 2 do you require this additional information to 3 be in the manual to make the bike safe for its 4 intended use? Require is my word. 5 A. So I guess I'm having a problem 6 with make it safe. The manual is really an 7 afterthought. I mean, you put it on the bike 8 so people see, read it and understand it, but 9 you put it in the manual for completeness 10 sake. Whether or not you put the explanation 11 of it for best practices, yes, it should be 12 there. If you don't put it, is it going to 13 make that big of a difference, probably not, 14 because if they're not getting it on the bike 15 they're really not likely to get it from the 16 manual. 17 You know, as we had this 18 discussion earlier about whether or not -- 19 MR. LEVINE: One second. He 20 asked you when answering that question to 21 assume that the warning was on the bike. 22 Am I right about that? 23 MR. HEINOLD: Oh, yes. 24 MR. LEVINE: So, in other</p>	<p style="text-align: right;">Page 176</p> <p>1 whether or not the motorcycle was defective 2 and whether or not BMW failed to provide 3 adequate warning. 4 Q. We can dance around this, sir. 5 You know I'm trying to be respectful, and 6 personally, I think you're avoiding my 7 questions. And we can just do some things 8 really simply and get to the nuggets of what 9 we want. 10 My question is this: You have 11 criticized my client for relying on -- strike 12 that. You criticized my client because they 13 may not -- a second purchaser, used purchaser 14 may not get the manual, correct? 15 You rendered that criticism in 16 your report. That is easy to answer yes or 17 no. Did you or did you not render that 18 criticism in your report? 19 A. What I said in the report is 20 that BMW couldn't rely upon secondhand users 21 having the manual. 22 Q. Is that relevant to this case? 23 And I ask that question because Mr. Yazdani as 24 a secondhand user received the manual, did he</p>

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<p style="text-align: right;">Page 177</p> <p>1 not? 2 A. You just asked me two 3 questions. So which one do you want me to 4 answer? 5 Q. Both. 6 A. Is it relevant to this case, 7 yes. Did Mr. Yazdani get a manual with the 8 bike, yes. 9 Q. Why is it relevant to this case 10 if he received a manual? 11 A. Because my opinions with 12 respect to the defect and the failure to warn 13 is on all of these motorcycles that have this 14 unique and specific fire hazard, not just Mr. 15 Yazdani's. I didn't write a report 16 specifically for Mr. Yazdani's bike. I wrote 17 it for the product at issue, the R 1150 R. 18 Q. I'd like you to look at Page 6 19 of your report. We'll come back to that. I 20 can't find the reference. It is on Page 6. 21 The bottom paragraph beginning with the word, 22 However... Are you with me? 23 A. Yes. 24 Q. However, it's not reasonable</p>	<p style="text-align: right;">Page 179</p> <p>1 leaving the vehicle idle at a standstill? 2 A. That's what my report is about, 3 but I'm not exactly sure what you're asking 4 me. 5 Q. Well, I'm reading, is that what 6 you're referring to? 7 A. Well, what I'm referring to 8 there is critical warning and safety 9 instructions must be provided where and when 10 the information is needed and where the 11 information is most likely encountered and 12 seen. 13 I don't know what other design 14 defects that are on this bike that an 15 on-product warning may need to be considered 16 as a third alternative, but I'm speaking 17 specifically in this report to the warning 18 that I have on Page 14. 19 Q. Does it have to be a product 20 defect to have a warning? 21 A. Well, it could be -- it doesn't 22 have to be a defect. It has to be critical 23 warning and safety instructions. So it has to 24 be important.</p>
<p style="text-align: right;">Page 178</p> <p>1 for to BMW NA to rely solely on the Rider's 2 Manual to communicate critical safety related 3 information and warnings to secondary owners 4 of the R 1150 R motorcycle. 5 What are the critical safety 6 related -- what is the critical related 7 safety -- I'm going to start over. 8 What is the critical safety 9 related information and warnings to which you 10 are referring in that sentence? 11 A. Well, it's the one we're 12 talking about, the one that I have on Page 14 13 in my report. 14 Q. So what is the alternative to 15 not relying on the Rider's Manual? 16 A. Well, as we discussed several 17 times, the alternative is to mitigate it 18 through fixing the design, providing a 19 safeguard. And then if you're not going to do 20 those two, provide an on-product warning as I 21 depicted on Page 15 of my report. 22 Q. So your reference there is only 23 to critical safety related information 24 relating to this issue for this fire, from</p>	<p style="text-align: right;">Page 180</p> <p>1 Q. So aren't you saying here that 2 BMW should not rely on the Rider's Manual to 3 communicate critical safety related 4 information of any type to secondary owners? 5 A. Again, it depends on what the 6 issue is. If there is a critical issue that 7 needs to be communicated for the operator to 8 safely use the bike, then burying it in the 9 manual as the sole and only way that you're 10 communicating it is ineffective. 11 So then they got to figure out 12 what is the best way to deal with that hazard, 13 and putting it in the manual is not the best 14 way to deal with that hazard. 15 Q. But is this the only safety 16 related information that's critical to the 17 safe operation of a motorcycle? 18 A. I haven't analyzed the complete 19 design of the bike and all the hazards 20 associated with its design. I'm only 21 concerned about this particular issue, the 22 fire because of the oil sight glass failure 23 when the bike is allowed to idle standstill. 24 Q. But your point is we have a</p>